Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-298

IRVING STOLBERG,

Petitioner,

—against—

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: August 27, 1976.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Irving Stolberg prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 2, 1976.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit ("the Court of Appeals"), entered June 2, 1976, has not yet been officially reported. The majority and dissenting opinions are printed in Appendix A, at pp. 1a-20a, below. The Court of Appeals affirmed the denial

by the United States District Court for the District of Connecticut ("the District Court"), of petitioner's motion to the District Court for a contempt judgment, which motion was brought on to enforce an earlier District Court judgment. The Memorandum of Decision of the District Court upon denying the motion has not been officially reported and is printed in Appendix C, at pp. 22a-25a, below.

The District Court's initial Memorandum of Decision in this case, dated February 29, 1972, has not been officially reported and is printed in Appendix F, at pp. 40a-51a, below. The opinion of the Court of Appeals on an earlier appeal in this case, decided January 29, 1973, is reported at 474 F.2d 485, and is printed in Appendix D, at pp. 26a-37a, below.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit of which review is sought here was entered June 2, 1976. A timely petition for rehearing was made in the Court of Appeals on June 15, 1976. The Court of Appeals denied the petition on July 23, 1976. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. In an action for wrongful dismissal brought by a State College faculty member under the Civil Rights Act of 1871, 42 U.S.C. §1983, in which action: the plaintiff sought reinstatement to his faculty position, with tenure, back pay, and additional money damages, against the defendant-trus-

tees of the State College; a judgment was entered ordering defendant-trustees to offer reinstatement to plaintiff, with tenure, and awarding compensatory damages; such judgment made no reference to the fact that after dismissal but before trial and judgment plaintiff had become and thereafter continued to be a member of the State's General Assembly or to any issue related to that fact; and at trial the State's Attorney General on behalf of defendant-trustees offered reinstatement with tenure in open court, having failed to plead any defense related to a claim that plaintiff was barred from reinstatement to the State College faculty because of his General Assembly seat although at the pretrial stage leave was sought, and the pretrial order directed the Attorney General, to plead such defense;—is the District Court in which the judgment was entered precluded from clarifying or modifying the judgment, after plaintiff's reinstatement to the State College faculty, so as to permit the State's Comptroller, on the advice of the State's Attorney General that plaintiff is barred from service on the State College faculty on the same grounds as those claimed to support the unpleaded defense, resulting in the termination of plaintiff's faculty salary by the Comptroller, while defendant-trustees continue plaintiff's status, and plaintiff continues his service, as a State College faculty member?

2. Under Rule 65(d) of the Federal Rules of Civil Procedure, is a judgment, with injunctive provisions ordering defendant-trustees of a State College to offer reinstatement to a dismissed faculty member, binding upon the State's Attorney General representing the trustees at trial and in connection with reinstatement and upon the State's Comptroller so as to preclude termination by the Attorney

General and the Comptroller of the faculty member's salary, subsequent to his reinstatement pursuant to the judgment, on grounds that could have been pleaded as a claimed defense prior to trial and judgment but which were not so pleaded?

3. Under Rules 8(b), 8(c), 12(b), and 16, of the Federal Rules of Civil Procedure and in an action in which a judgment ordering reinstatement of a dismissed faculty member directed to the defendant-trustees of the State College has been entered, with no reservation as to a defense that might have been pleaded but was not although ordered to have been pleaded in the pretrial order, and in which action the trustees were represented by the State's Attorney General, is the Attorney General and is the State's Comptroller (who disburses State College faculty salaries) precluded from terminating the faculty salary of the reinstated faculty member subsequent to reinstatement on grounds of the defense that could have been but was not pleaded?

Statement of the Case

This case arose out of the dismissal of petitioner as a faculty member at Southern Connecticut State College ("SCSC") by the trustees governing SCSC at the end of the academic year 1968-1969. On December 15, 1969, petitioner commenced an action in the District Court under the Civil Rights Act of 1871, 42 U.S.C. §1983, claiming violations of rights under the First and Fourteenth Amendments, and seeking reinstatement with tenure, back pay, additional compensatory damages, exemplary damages, and attorneys' fees. Federal jurisdiction in the court of first instance is based upon 28 U.S.C. §1343(3). The defendants

were the members of the board of trustees, the executive secretary of the board of trustees, and the president of SCSC, in their individual and official capacities. They were represented by the Attorney General of the State of Connecticut.

Petitioner was successful in obtaining reinstatement with tenure and back pay in the District Court pursuant to a judgment entered March 7, 1972. The judgment is set out in Appendix E, at pp. 38a-39a, below. The judgment ordered that "defendant board of trustees promptly offer to reinstate the plaintiff as a faculty member with tenure at Southern Connecticut State College for the 1972-1973 academic year with the same seniority as if his contract had been renewed in 1969"; it contained no specific condition, exception, or reservation, affecting petitioner's right to reinstatement related to the unquestioned fact that beginning January 6, 1971, and continuously since then, petitioner had served as a member of the House of Representatives of the General Assembly of the State of Connecticut.

Attorneys' fees were added to petitioner's recovery as a result of an appeal taken in 1972 to the Court of Appeals. Reinstatement pursuant to the judgment had to be accomplished in the light of the fact that, after his dismissal in 1969, petitioner had obtained a faculty position at a private college almost immediately. The terms and timing of his return to the SCSC faculty were arranged through correspondence between petitioner, represented by his attorney, and the trustees, represented by the State's Attorney General. The effective date of petitioner's reinstatement was August 28, 1974; he resumed his position and commenced teaching at SCSC in the fall of the academic year 1974-1975 and received his faculty salary for a period of about ten weeks.

The proceedings leading to a second appeal to the Court of Appeals and to this petition arise out of a combination of events, some of which took place before reinstatement and some of which took place afterwards. The events before reinstatement are these. At the pretrial conference in this case, in April of 1971, the Attorney General sought to raise a defense to petitioner's claim for reinstatement. The claim was based on petitioner's membership in the General Assembly and what will be referred to here as the "dual job ban" provisions of Connecticut's Constitution and statutes. Section 11 of Article Third of the Constitution of 1965, and Section 2-5 of the Connecticut General Statutes. These provisions are set out in Appendix K, at pp. 74a-75a, below. The portion of defendant-trustees' Pretrial Memorandum reciting the "dual job ban" provisions and claiming that when petitioner " . . . became a member of the General Assembly . . . , he became ineligible for the [reinstatement] orders he seeks . . . " is set out in Appendix G, pp. 52a-53a, below. The Pretrial Report and Order, filed May 10, 1971, permitted and directed the Attorney General to plead a defense based on the "dual job ban" provisions. However, the Attorney General never amended the trustees' "Answer and Defenses" to plead such a defense; on the contrary, at the close of trial and on behalf of the State College trustees, the Attorney General offered in open court to reinstate petitioner with tenure. The Pretrial Report and Order is set out in Appendix H, pp. 54a-57a, below. The facts as to the commencement of the action, the defendants in the action, petitioner's election to and continuing membership in the General Assembly, and the defendant-trustees' failure to amend their "Answer and Defenses" to include a defense based on the "dual job ban" provisions, are established by a stipulation on file. (Appendix J, ¶¶1-8,

pp. 65a-68a, below.) A copy of the eight pages of transcript of the entire proceedings after the close of petitioner's case up to the close of trial is set out in Appendix I, pp. 58a-64a, below, including statements that the trustees would grant petitioner tenure at pp. 60a and 63a.

Subsequent to trial and judgment, the Attorney General, acting for the defendant-trustees, corresponded to negotiate the details of petitioner's return to SCSC, and it is established by portions of a stipulation on file, containing some of such correspondence and the details of the reinstatement, that the trustees reinstated petitioner pursuant to the District Court judgment, effective August 28, 1974. These matters are set out in paragraphs 19 through 22 of the stipulation, in Appendix J, at pp. 69a-70a, below.

The pertinent events after reinstatement are described in the majority opinion in the Court of Appeals:

" . . . [T]he State Auditors of Public Accounts sent letters to the Legislative Management Committee and to the then Governor, Hon. Thomas J. Meskill, on October 7, 1974 noting that under article 3, §11 of the State Constitution no member of the General Assembly shall, during the term for which he is elected, hold any appointive position in the executive branch of the state government. In response to Governor Meskill's inquiry, the Chairman of the Board of Trustees of SCSC advised him on October 17, 1974 that the Board was bound by the judgment of the United States District Court to return Stolberg to the faculty and that it was therefore inappropriate for the Trustees 'to raise any questions with Mr. Stolberg concerning his position on the faculty.' The Comptroller had also raised the same

issue with the Attorney General and on October 28, 1974 the latter, relying upon his earlier opinion of February 9, 1971 which involved another state legislator who was teaching at a different State College, held that Stolberg was subject to the dual job ban, and further that under *State ex rel. Butera* v. *Lombardi,* 146 Conn. 299, 150 A.2d 309 (1959), when Stolberg became a member of the General Assembly he surrendered his position at SCSC and could not hold his position as an assistant professor at that institution.

"On the basis of that opinion, the State Comptroller commenced withholding Stolberg's bi-weekly SCSC checks commencing on November 6, 1974, and has continued to do so. The Board of Trustees has continued to submit Stolberg's name to the State Comptroller for payment on each successive college payroll. . . . " (Appendix A, p. 3a, below. Footnote omitted.)

Thus, at the close of trial on December 21, 1971, the Attorney General offered reinstatement with tenure in the District Court, and the ensuing judgment specifically ordered the trustees to offer reinstatement. By not pleading the claimed defense based on the "dual job ban" provisions, the Attorney General and the trustees not only bypassed adjudication of the claim, they precluded the equitable adaptation that could have been fashioned in arranging for reinstatement had their claim been valid. However, the judgment made no reference to the possible impediment. The absence in the judgment of any specific terms reserving an issue relating to the "dual job ban" provisions precluded any related appeal by petitioner then as to the reinstatement order. After reinstatement pursuant to the judgment, upon a question whether the "dual job ban" provision affected petitioner's faculty status, the trustees, who were

the defendants in the District Court in 1971, regarded themselves bound by the judgment and continued petitioner's faculty status, submitting his name on successive payrolls for salary payments. The Attorney General, however, who had represented the defendant-trustees in the District Court, did not regard himself as bound by the judgment and advised the Comptroller that petitioner was and had been barred from serving on the SCSC faculty since January of 1971, resting that advice on precisely the claim that he had sought, been directed, but failed, to plead as a defense in the District Court, with the result of such advice to the Comptroller being the termination of petitioner's salary.

In these circumstances, petitioner returned to the District Court to seek enforcement of the 1972 judgment. By application and petition for the issuance of an order to show cause and for a contempt judgment naming the SCSC trustees as defendants and citing in as additional respondents the State's Governor, Comptroller, Attorney General, and certain other officials, petitioner sought injunctive relief to preserve what had been obtained under the 1972 judgment from frustration or interference on grounds that could have been, but were not, pleaded and raised in the proceedings leading to the judgment. The District Court denied the motion for contempt judgment in a decision on June 23, 1975, and the crucial portion of that decision states:

> " . . . The judgment is hereby clarified to indicate that it does not prejudice the state's right to assert its constitutional dual-job ban against Stolberg. Any complaints Stolberg may have about the assertion of this ban must be raised in a separate proceeding (most appropriately brought in the state courts)." (Appendix C, p. 25a, below.)

The Court of Appeals affirmed, the majority opinion quoting this portion of the District Court's decision (Appendix A, p. 4a, below) and adding:

> ". . . The court which entered the judgment has unambiguously held that its terms did not preclude the Attorney General from subsequently relying upon the dual-job ban. If the underlying judgment had explicitly provided that the dual-job ban issue had not been litigated and that the defendants were not precluded from raising it, there would be no question that the injunctive relief and finding of contempt now sought would be properly denied. The court below has clarified its own judgment and the result should be no different." (Appendix A, p. 7a, below.)

The importation of such new terms into a judgment in these circumstances is in direct conflict with the decision in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932), in which this Court stated:

> ". . . The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting."

The result also threatens the long-recognized principle of federal procedure which, in the interests of avoiding piecemeal litigation and of administering equitable proceedings so as to give full and final relief and to administer complete justice, condemns the seriatim use of claimed defenses "as an excuse for disobeying the final decree of the court" and requires that the "decree must be final and conclusive on all the rights of all the parties actually before the court."

In re Chiles, 89 U.S. 157, 166 (1875). There, following a decree in a suit to establish title to bonds, defendants were found in contempt for having acted to impair and frustrate the equitable relief afforded; defendants announced a competing claim that clouded title under the decree when the claim might have been set up as a defense in the proceedings leading to the decree. Here, similarly, the District Court, by its 1972 judgment, adjudicated petitioner's entitlement to tenured status as a faculty member at SCSC. Any impediment to such status that could have been asserted at the time was required to have been asserted in order that the decree be final and conclusive.

As stated in the dissenting opinion in the Court of Appeals:

> ". . . If ever a case was governed by the doctrine of *res judicata*, this is it. In 1971, *after* plaintiff had become a member of the Connecticut General Assembly, the Attorney General of that state, as the representative of the Trustees of the State Colleges . . . deliberately waived Connecticut's dual-job ban as a defense to plaintiff's suit for reinstatement to SCSC. . . .
>
> "The majority now reaches a bizarre conclusion. Despite the Attorney General's earlier waiver of the dual-job ban defense, it holds that he now may litigate the issue though the case has been tried and the state's other defenses have failed. The effect is to violate the very purpose of the doctrine of *res judicata*, which was designed to discourage just such belated piecemeal assertion of defenses that *might* properly have been raised during the trial, regardless whether they

were, as here, deliberately waived. A waiver provides an *a fortiori* case for application of the doctrine." (Appendix A, p. 11a, below.)

In reaching the bizarre conclusion that "reinstatement" under a federal judgment may turn into "reinstatement without pay," on grounds of a claim that could have been, but was not, pleaded as a defense in the proceedings leading to the judgment, the opinions below referred to the post-judgment correspondence between petitioner and the Attorney General, who represented the trustees, relating to the details of reinstatement, and to a pre-judgment colloquy at the close of trial relating to the issues to be treated in submitting post-trial briefs to the court. We turn to these matters which relate to the second and third of the "Questions Presented."

It is important to note that what has been cut off is only part of petitioner's employment rights in the faculty position achieved through reinstatement. The trustees of SCSC, and the Attorney General while acting for the trustees, have uniformly viewed petitioner to be entitled to his SCSC position under the judgment whatever his status in the General Assembly. The trustees advised the Governor that they were bound by the judgment, and the Attorney General, on behalf of the trustees, the Comptroller, himself, and all defendants and respondents brought into the contempt and enforcement proceeding, stipulated that the trustees reinstated petitioner pursuant to the judgment. (Appendix J, ¶22, p. 70a, below.) Indeed, after the 1972 judgment, but before petitioner gave up his interim teaching position at a private college, inquiry was made of the Attorney General for the plain

purpose of finding out if there was any possible hitch in the way of petitioner's return to SCSC. On July 10, 1973, the Attorney General advised:

> "As to your second question: What action will the the Attorney General or the defendants take if Professor Stolberg maintains his seat in the legislature and accepts reinstatement at Southern Connecticut State College? *The defendants have been ordered to reinstate the plaintiff with the same seniority as if the contract had been renewed in 1969. You have received Doctor Jenning's letter which states the pay grades for assistant professor.* We realize that your client has had commitments to Quinnipiac College and we are willing to make every reasonable concession required to offer the courses for which it relies upon the services of Professor Stolberg. The defendants seek to comply not only with the letter of Judge Blumenfeld's order, but with the spirit of his order, as well. *The defendants are holding open the doors to SCSC whether Professor Stolberg decides to return for the 1973-1974 school year or the 1974-1975 school year.*" (Stipulation dated January 7, 1975, Appendix J, ¶19, pp. 69a-70a, below. Emphasis added.)

Thus, until after his reinstatement, petitioner had no reason to think that defendant-trustees, as represented by the Attorney General, were not proceeding towards reinstatement without impediment pursuant to the judgment, had no reason to seek modification or clarification from the District Court, and had no reason to expect that he would be confronted with the behavior of a split personality shortly after reinstatement, one group of state officials

viewing petitioner as entitled to his faculty position, another group viewing him as barred, and the Attorney General changing his view according to the occasion of representation.

In this connection, we refer to the State's structural arrangements under which petitioner has been reinstated and maintained as an SCSC faculty member by the defendant-trustees of the State institution from which he had been dismissed while his salary has been terminated by the State Comptroller. Section 2 of Article Eighth of the 1965 Constitution, which Article is entitled "Of Education," requires the State to maintain a system of higher education, with the General Assembly having full power to establish and organize the system through legislation. (Appendix K, p. 75a, below.) Under Section 10-322, Conn. Gen. Stats., "the state system of higher education" is defined to include the state colleges. (Appendix K, p. 77a, below.) Under Sections 10-109b and 10-329a (Appendix K, pp. 76a-78a, below), the Board of Trustees for the State Colleges "may employ faculty" and "shall fix the compensation of such personnel, establish terms and conditions of employment and prescribe their duties and qualifications" and the trustees are given full powers of governance and sole jurisdiction over the State Colleges, including the selection, appointment, assignment of duties, amount of compensation, termination of service, and rank and status, of the members of the professional staff of the State Colleges. However, the actual disbursement of the salaries of such faculty members is in the hands of the State's Comptroller under Section 3-119, Conn. Gen. Stats. (Appendix K, p. 76a, below.)

Petitioner commenced this action against the SCSC trustees, and the resulting judgment ordered them to offer reinstatement to him. Under state law, the trustees had full and sole power to appoint and employ faculty, fix their compensation, and otherwise establish the terms and conditions of their employment. Under Rule 65(d) of the Federal Rules of Civil Procedure, the injunctive provisions of the judgment bound the defendant-trustees, "their attorneys" (the Attorney General), and "their officers, agents, servants, employees." (Appendix K, p. 82a, below.) The long and the short of it is that if the injunctive order of reinstatement directed to the governing trustees of a state institution is not binding under these terms of Rule 65(d) upon the Attorney General who represented such defendants and upon the Comptroller who disburses salaries to the institution's staff, then either the dismissed employee will have to name a galaxy of state officials as defendants to obtain binding and effective relief or the employee will be subject to the piecemeal defeat of rights recovered under a federal judgment even though successful in his suit. It is such a prospect that would follow upon the result here that is referred to in the dissenting opinion below as " . . . the dire legal and social consequences if a government bureaucracy were freely permitted to fragmentize itself into discrete units and to structure the lines of authority in such a fashion as to circumvent compliance with a valid court order." (Appendix A, p. 20a, below.) Such a result would undermine, at one step removed, the principle of *In re Chiles,* discussed at pages 10-11, above, and would change a federal judgment from an effective instrument of relief into a concealed trap. To permit the Attorney General, as the trustees' representative, who assured

petitioner that the trustees were "holding open the doors," purportedly in carrying out the judgment, to turn around and act to cause the termination of salary after petitioner went through the doors, is to defeat the purpose of the federal litigation and judgment and to foster attempts to circumvent compliance. The question whether the Attorney General and the Comptroller are bound under Rule 65(d) cannot be avoided. The Attorney General's letter, quoted at page 13, above, only makes his subsequent actions more rather than less subject to condemnation.

It is appropriate here to discuss briefly the "dual job ban" provisions. Article Third, Article Fourth, and Article Fifth, of the Connecticut Constitution of 1965 are entitled, respectively, "Of the Legislative Department," "Of the Executive Department," and "Of the Judicial Department," and contain the organic provisions governing the three departments of the state government. Section 11 of Article Third provides that, "No member of the General Assembly shall, during the term for which he is elected, hold or accept any appointive position or office in the judicial or executive department of the state government . . . ." (Appendix K, p. 74a, below.) This prohibits a legislator from the simultaneous holding or acceptance of a position or office in one of the other two departments of the state government, and it further bars him from such holding or acceptance for the duration of his term even if he were to resign as a legislator. The state system of higher education, of which the State Colleges are part, is provided for under the Connecticut Constitution not under one of the three articles establishing the legislative, executive, and judicial departments, but under Article Eighth, entitled

"Of Education," with the General Assembly having full power over the establishment and organization of the system. (Appendix K, p. 75a, below.) In 1914, when the Attorney General was asked whether the provisions of the then recently enacted Connecticut Civil Service Act applied to the faculties of the "normal schools," which schools were the predecessor institutions of the State Colleges, the Attorney General advised that such faculty members were not state officials or employees "because they are not employed by one of the political departments of the state." (1913-14 Opinions of the Attorney General, 165-69.) Provisions for the institutions belonging to the system of higher education did not appear in Connecticut's Constitution until the adoption of a new constitution in 1965. In *Simmons* v. *Budds,* 165 Conn. 507, 514, 338 A.2d 479, 474-83 (1973), the Supreme Court of Connecticut examined the status under the 1965 Constitution of The University of Connecticut, a part of the system of higher education. The Court indicated the independence and autonomy of the University and, referring to the proceedings of the 1965 Constitutional Convention, stated, ". . . it was intended that the board of trustees and the administrators were to be free to decide what is wise in education policy." It pointed out that, on the basis of the constitutional provision of Section 2 of Article Eighth, the ultimate control of the institutions within the system of higher education rested not with the executive or judicial departments but with the legislature, which clearly has full legislative power over the system.

The other "dual job ban" provision, Section 2-5 of the Connecticut General Statutes, provides that, "No member of the General Assembly shall, during the term for which he is elected, be nominated, appointed or elected by the

governor, the general assembly or any other appointing authority of this state to any position in the judicial, legislative or executive department of the state government. . . . " (Appendix K, p. 75a, below.) This provision does not bar the simultaneous holding of office. It does not bar one who is not a member of the General Assembly, but who holds some other judicial, legislative, or executive position, from being elected to the General Assembly. The provision is directed at limiting the possibility that a legislator might trade, or appear to trade, legislative action for an appointment or election by the governor, the General Assembly, or another appointing authority of the state, to a position elsewhere in the three state departments. This provision, even if the State College faculties were held to be within the legislative or executive department of the state government, would not prohibit a faculty member from running for and being elected to the General Assembly. Had this provision been raised as a defense on the pleadings it would have been open to the District Court to determine that the reinstatement pursuant to the Court's judgment was not appointment or election by the Governor, the General Assembly or any other appointing authority of the state within the prohibition of the statutory provision, and that, in any event, since petitioner could have run for and been elected to the General Assembly while he was a member of the State College faculty, the absence from that faculty resulting from his wrongful dismissal by defendants should not bar reinstatement.

Thus, there is substantial doubt that the State College faculties fall within the legislative or executive departments of the state government. The Connecticut Supreme Court has indicated that if those faculties are within either department, it is the legislative department. If that is the case, the constitutional "dual job ban" provision does not apply, and there would be no bar under the statutory provision to petitioner's running for and holding a General Assembly seat if he first held a faculty position. The two important points here are, however, not that the claimed defense was doubtful but that (1) the termination of salary achieves no legitimate state purpose in that if any "dual job ban" provision applies, holding up salary while petitioner occupies the two positions does not achieve compliance with the ban and merely harasses petitioner, and (2) whatever ban might apply, it could easily have been dealt with had it been pleaded and adjudicated, perhaps by requiring reference to a state court, by shaping equitable relief according to the outcome. The present complications would have been entirely avoided. The pleadings and the judgment gave no hint that such complications were in the offing.

The proceedings at the close of trial are set forth in full in Appendix I, at pages 58a through 64a, below. The defense rested without putting on evidence, and the Court immediately turned to the question of briefs:

> Mr. Giber [Assistant Attorney General]: Defense rests.
>
> The Court: What do you gentlemen want to do now in connection with the submission of the case to the court? . . . (Appendix I, p. 58, below.)

Thereafter, the following took place:

> The Court: Yes.
>
> Well, does the defendant take the position that it is willing to offer tenure to—

Mr. Giber: Yes sir, we will give him tenure immediately.

The Court: The reason I ask is one aspect of the relief sought for is injunctive relief.

So if that is so, *the only remaining issue in the case is one of damages,* isn't it?

Mr. Winer: Yes. . . . (Appendix I, pp. 59a-60a, below. Emphasis added.)

Thereafter, it was specifically pointed out that the issue as to the "dual job ban" had not been pleaded. (Appendix I, p. 64a, below.) Rule 8(b) of the Federal Rules of Civil Procedure requires a party to state "in short and plain terms his defenses to each claim asserted." (Appendix K, pp. 78a-79a, below.) Rule 12(b) requires the pleading of every defense, "in law or fact, to a claim for relief . . . in the responsive pleading. . . ." (Appendix K, p. 80a, below.) Rule 16 provides that the pretrial order "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. . . ." (Appendix K, p. 81a, below.) Rule 65(d) requires injunctions to be "specific in terms . . . ." (Appendix K, p. 82a, below.) If in these circumstances the "dual job ban" question, so clearly laid to rest under the above rules by its absence from the pleadings, in spite of the pretrial order, and by the absence of any specific reservation in the judgment, can be resurrected as it has been, the possibility of reliance on such clear procedural provisions will have been destroyed. Parties will be forced to a tedious insistence that their opponents' defenses be searched out, pleaded, and adjudicated. Courtroom colloquy will be laden with repetitive reservations and qualifications. Dissatisfied litigants will have new cause to search the record and extraneous facts to find excuses for noncompliance.

It needs no further discussion to show that the decisions below depart widely from the accepted and usual course of judicial proceedings so as to frustrate the purpose of securing just, speedy, and inexpensive, determinations of actions.

Constitutional Provisions, Statutes, and Rules Involved

Pertinent constitutional provisions, statutes, and rules are printed in Appendix K, at pp. 74a-82a, below. Section 1983 of Title 42 of the United States Code is set out at p. 74a, below. Section 11 of Article Third and Section 2 of Article Eighth of the Connecticut Constitution are set out at pp. 74a-75a, below. Sections 2-5, 3-119, 10-109b, 10-322, and 10-329a, of the Connecticut General Statutes are set out at pp. 75a-78a, below. Portions of Rules 8, 12, 16, and 65, of the Federal Rules of Civil Procedure are set out at pp. 78a-82a, below.

Reasons for Granting the Writ

The decisions below are in direct conflict with the decision in *United States* v. *Swift & Co.,* 286 U.S. 106, 119 (1932):

> ". . . The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting."

This passage from the *Swift* opinion remains the governing principle in recognized authorities. 11 Wright and Miller, *Federal Practice and Procedure: Civil,* §2961, at 600-603

(1973). The commentator there states, "As this passage suggests, the availability of modification is not a substitute for direct appeal from a judgment." (Footnote omitted.) If modification is not to be a substitute for a direct appeal, it is clear that the defendants and others subject to the injunction under Rule 65(d) should not be permitted to undermine or frustrate its terms without seeking modification, but that is just what has occurred here.

The decisions below are also in direct conflict with the principles of *res judicata* and their application to the enforcement of judgments containing equitable or injunctive provisions, insofar as those principles and their application are directed to the goals of avoiding multiplicity of litigation, of providing full, effective, and final, relief in a single action, and of giving effect to the purpose of injunctive relief while discouraging experimentation with disobedience and circumvention. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192-94 (1949); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1877); *In re Chiles*, 89 U.S. 157, 166 (1875); *Class* v. *Norton*, 505 F.2d 123, 125 (2d Cir. 1974); *NLRB* v. *Teamsters Local 282*, 428 F.2d 994, 999 (2d Cir. 1970); *John B. Stetson Co.* v. *Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942).

The crux of effective relief in a successful action for wrongful dismissal is the restoration of the employment relationship intact together with monetary repair of the damage caused in the interim between dismissal and reinstatement, and free of jeopardy from future interference on old grounds. The results below threaten the integrity and the efficacy of a judgment affording such relief.

Where the successful claim for reinstatement is fully contested, the normal remedy of reinstatement, back pay,

and possible additional damages, may be the subject of a federal judgment in an action such as this under the Civil Rights Act of 1871, or in matters coming before a district court under the United States Arbitration Act, 9 U.S.C. §§1-17 (see, for example, *Brown* v. *Bridgeport Rolling Mills Co.*, 245 F. Supp. 41 (D. Conn. 1965)), or in an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2000e-17. This is an important class of cases, and this Court's decision in *Fitzpatrick* v. *Bitzer*, 44 U.S.L.W. 5120 (June 28, 1976), emphasizes the broad range of state employers and officials that may be the subject of a judgment combining equitable and legal relief and giving rise to the compliance and enforcement questions involved here.

By definition, reinstatement following successful prosecution of such a claim will lead to the reestablishment of the employment relationship between parties with a history of antagonism. Relief and the protection of such relief should be clear and definite so as not to open avenues to, indeed, invite, the continuance and enlargement of such antagonism.

The results below present important problems under the Federal Rules of Civil Procedure. Those results affect litigants in an important class of actions at all stages of litigation, in choosing defendants to name, in the conduct of pretrial and trial proceedings, and in effecting compliance with a judgment after it is entered. The results below, and what they portend, raise questions of considerable importance in enforcing liability and providing effective equitable relief under federal equitable enactments, and those results merit review. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 394 (1946).

The decisions below carry a threat to the guiding principle governing the construction of the Federal Rules that they should secure the "just, speedy, and inexpensive determination of every action." In such circumstances, review is merited in this Court. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 136 (1968); *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965); *Hickman* v. *Taylor*, 329 U.S. 495, 497 (1947).

In addition, the results below depart widely from the accepted and usual course of judicial proceedings, and the result in the Court of Appeals sanctions such departure by a lower court. The effect of such results upon a broad category of litigants and actions is such as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 2, 1976.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 704—September Term, 1975.

(Argued April 7, 1976 Decided June 2, 1976.)

Docket No. 75-7426

IRVING STOLBERG,

Plaintiff-Appellant,

—against—

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, et al.,

Defendants-Appellees and Respondents-Appellees.

Before:

FRIENDLY, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the District of Connecticut, Hon. M. Joseph Blumenfeld, *Judge*, denying plaintiff's motion for a contempt judgment.

Affirmed.

LOUIS M. WINER, New Haven, Connecticut (Tyler, Cooper, Grant, Bowerman & Keefe, New Haven, Connecticut), *for Plaintiff-Appellant.*

BERNARD F. MCGOVERN, JR., Assistant Attorney General, Hartford, Connecticut (Carl R. Ajello, Attorney General, Connecticut), *for Defendants-Appellees and Respondents-Appellees.*

MULLIGAN, *Circuit Judge:*

The plaintiff Irving Stolberg brought an action in December 1969 in the United States District Court for the District of Connecticut under the Civil Rights Act, 42 U.S.C. § 1983, against the former president and members of the Board of Trustees of the Southern Connecticut State College (SCSC) based on their nonrenewal of his teaching contract and consequent denial of tenure, allegedly in violation of his First Amendment and Due Process rights. On February 29, 1972, Chief Judge M. Joseph Blumenfeld ordered entry of judgment for the plaintiff, directing that Stolberg be reinstated with tenure and no loss of seniority and further allowing $9,000 in compensatory damages to cover his loss of salary. The defendants did not seek review of that decision, but Stolberg appealed to this court asking for punitive damages, additional compensatory damages and attorney's fees. This court's opinion, reported at 474 F.2d 485 (1973), affirmed the denial of punitive damages and additional compensatory damages but reversed the denial of attorney's fees and remanded for a determination of their amount.

After his dismissal, Stolberg became a successful candidate for the office of State Representative in 1970, and was sworn in as a member of the Connecticut General Assembly on January 6, 1971. He was reelected in 1972 and 1974 and presently holds this office. After a delay of some two years, Stolberg resumed his professorship at SCSC on August 28, 1974. Having audited the payrolls

submitted by the college, the State Auditors of Public Accounts sent letters to the Legislative Management Committee and to the then Governor, Hon. Thomas J. Meskill, on October 7, 1974 noting that under article 3, § 11 of the State Constitution[1] no member of the General Assembly shall, during the term for which he is elected, hold any appointive position in the executive branch of the state government. In response to Governor Meskill's inquiry, the Chairman of the Board of Trustees of SCSC advised him on October 17, 1974 that the Board was bound by the judgment of the United States District Court to return Stolberg to the faculty and that it was therefore inappropriate for the Trustees "to raise any questions with Mr. Stolberg concerning his position on the faculty." The Comptroller had also raised the same issue with the Attorney General and on October 28, 1974 the latter, relying upon his earlier opinion of February 9, 1971 which involved another state legislator who was teaching at a different State College, held that Stolberg was subject to the dual job ban, and further that under *State ex rel. Butera* v. *Lombardi*, 146 Conn. 299, 150 A.2d 309 (1959), when Stolberg became a member of the General Assembly he surrendered his position at SCSC and could not hold his position as an assistant professor at that institution.

On the basis of that opinion, the State Comptroller commenced withholding Stolberg's bi-weekly SCSC checks commencing on November 6, 1974, and has continued to do so. The Board of Trustees has continued to submit Stolberg's name to the State Comptroller for payment on each successive college payroll. On December 12, 1974, Stolberg

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1 "No member of the general assembly shall, during the term for which he is elected, hold or accept any appointive position or office in the judicial or executive department of the state government, or in the courts of the political subdivisions of the state, or in the government of any county. . . ."

filed an application and petition in the Connecticut District Court for the issuance of an order to show cause and for a contempt judgment naming as defendants the members of the Board of Trustees of SCSC, and as respondents the Auditors of Public Accounts, the Governor, the Attorney General, the Assistant Attorney General, the Comptroller and certain subordinate state officials. The petition sought injunctive relief to enforce the prior judgment of the court, damages, basic salary, and counsel fees. Moreover, on June 11, 1975, after having filed almost 300 pages of briefs, plus exhibits and affidavits, plaintiff filed a motion for an interim order that he be paid his salary until the contempt motion was adjudicated. On June 23, 1975, Judge Blumenfeld denied the motion for a contempt judgment in an unpublished opinion in which, after reciting the facts, he stated:

> The point of the judgment that the board offer to reinstate Stolberg was to put him in as good a position as he would have occupied but for the unconstitutional infringement of his first amendment rights. Although the judgment did not explicitly indicate that no decision on the merits of a dual-job ban claim had been made, I indicated to the parties in open court that I did not regard this issue as being in the case. . . . Now Stolberg seeks to use the judgment not as a shield against interference with his constitutional rights but as a sword predicated on grounds not litigated in the prior proceedings. This he may not do. The judgment is hereby clarified to indicate that it does not prejudice the state's right to assert its constitutional dual-job ban against Stolberg. Any complaints Stolberg may have about the assertion of this ban must be raised in a separate proceeding (most appropriately brought in the state courts).

The motion for a contempt judgment is denied. (Footnote omitted). This appeal followed.

I

The appellant argues that the failure of the Board of Trustees defendants in the 1969 civil rights action to raise the dual job ban defense based on article 3, § 11 of the State Constitution and § 2-5 Conn. Gen. Stats.[2] bars the present defendants from raising the issue as a ground for refusing to pay Stolberg's salary at SCSC. The argument is posited on the principle that a final, valid determination on the merits is conclusive on the parties and those in privity with them, not only as to the matters adjudicated but those which could have been litigated in the prior action. Thus appellant invokes the doctrine of res judicata—the bar of the prior judgment extends "not only to all matters pleaded, but to all that might have been . . . ." *Irving National Bank* v. *Law*, 10 F.2d 721, 724 (2d Cir. 1926). Res judicata is thus distinguished from collateral estoppel where a prior judgment operates as an estoppel against a party only where there was an actual litigation and determination of the issue now in controversy, even though the subsequent action or claim is different. The distinction is ancient and well recognized. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955); *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351 (1877); see 1B J. Moore, Federal Practice ¶¶ 0.405[3], 0.441[1] (2d ed. 1974).

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2 "No member of the general assembly shall, during the term for which he is elected, be nominated, appointed or elected by the governor, the general assembly or any other appointing authority of this state to any position in the judicial, legislative or executive department of the state government, except as provided in this section. . . ."

There is no basis for the application of the doctrine of collateral estoppel here. The issue of the dual job ban was never litigated in the 1969 civil rights action. In fact, no one claims that it was. The issue thus becomes whether or not under res judicata principles the present respondents are now barred by the fact that the dual job ban *might* have been raised by the defendants in that action but was not. The defendants' pretrial memorandum in the initial action did raise the issue of the state constitutional and statutory ban on dual office holding. The pretrial report submitted by two special masters and endorsed "So Ordered" by a United States District Court Judge on May 7, 1971 indicated that Stolberg was then a member of the State Legislature and that the defendants would file an amended answer adding a special defense (presumably the dual job ban) within seven days. No such defense was ever interposed. However, at the close of trial, the plaintiff's attorney, Louis M. Winer, called the attention of the court and the Assistant Attorney General, Sidney D. Giber, to the fact that the defendants had failed to file a defense "about the question of office holding while on the faculty." The following colloquy ensued:

> Court: So it's not in the case. A dual job ban might affect the right to tenure?
>
> Mr. Winer: It might affect his right to return. Well, I withdraw the comment.
>
> Court: All right. Adjourn Court.

Thus the record not only reveals that the issue might have been litigated and that it was not, but that counsel for the plaintiff was perfectly well aware of it and did not press the point that it might affect his client's right to return, and that the court, as its subsequent opinion makes clear, did not consider the issue to be in the case. Since it

was not an issue in the case below and not argued on appeal our subsequent substantial affirmance of the judgment adds nothing to appellant's position.

In view of Judge Blumenfeld's understanding that the judgment below did not prejudice the Attorney General's present position and the court's subsequent clarification of its own judgment, it is difficult to understand how the general res judicata rubric, which precludes what "might" have been pleaded, can now be raised when the issue was deliberately eliminated from the case, with the apparent acquiescence of plaintiff's counsel who, although recognizing that the issue might jeopardize his client's return to the faculty, nonetheless withdrew his comment and did not press the point.

Res judicata makes a final order or judgment rendered in one proceeding conclusive under certain circumstances in another and different proceeding. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 402 (1940); *United Shoe Mach. Co.* v. *United States*, 258 U.S. 451, 458-59 (1922). Here, however, no second or different action has been brought. The relief sought by the petition below is essentially an enforcement of the judgment already entered in this case, joining as respondents state officials never parties to the initial action. The court which entered the judgment has unambiguously held that its terms did not preclude the Attorney General from subsequently relying upon the dual job ban. If the underlying judgment had explicitly provided that the dual job ban issue had not been litigated and that the defendants were not precluded from raising it, there would be no question that the injunctive relief and finding of contempt now sought would be properly denied. The court below has clarified its own judgment and the result should be no different.

That the issue was not in the case and was not deemed vital by either party or the court is perhaps understand-

able. It was not inevitable that Stolberg would continue to run for office and be elected nor was it inevitable that he would return to teaching at SCSC. His justifiable complaint was that he had been terminated for the exercise of free speech rights and not because he lacked ability to perform his job. His professional reputation was vindicated by the judgment which also awarded him $9,000 in compensatory damages and approximately $16,000 for counsel fees. While he was offered reinstatement and tenure at the close of the trial and judgment was entered directing reinstatement, he did not even seek to return to the college until August 28, 1974, more than two years after the judgment had been entered. He had in the interim found a teaching post at another college.

In addition to the uncertainty of Stolberg's return to college and continuance in public office, the dual job ban of the Connecticut Constitution and statute presented unresolved questions of state law which, as Judge Blumenfeld has properly observed, are most appropriately determined by state courts. It is basic that a state court's construction of its own constitution is definitive and binding upon the federal court. *AF of L* v. *Watson,* 327 U.S. 582, 596 (1946); *Kelley* v. *Swenson,* 481 F.2d 86, 89 (8th Cir. 1973); *Sims* v. *Lane,* 411 F.2d 661, 665-66 (7th Cir.), cert. denied, 396 U.S. 943 (1969). Moreover, there has been no state court decision construing the provision in the context here posed. Hence the reluctance of the federal district court to construe the state law is understandable. See *Lehman Bros.* v. *Schein,* 416 U.S. 386, 390 (1974); *Askew* v. *Hargrove,* 401 U.S. 476, 478 (1971).

We note parenthetically that appellant has recognized the issue of comity, since on July 23, 1975, two days after filing his notice of appeal here, he commenced an action in the Superior Court of Connecticut seeking a declaratory judgment and other relief as to his right to compensation

under the pertinent Connecticut constitutional and statutory provisions.

Appellant's argument that his natural understanding was that since reinstatement had been ordered there would be no question of his right to salary is belied by his counsel's letter to the Assistant Attorney General on June 26, 1973 which in pertinent part reads:

> [W]hat action will your office or the defendants take if Mr. Stolberg maintains his seat in the legislature and accepts reinstatement at Southern Connecticut? *I am sure you recognize that there are questions whether Article 3, Section 11 of the 1965 Constitution covers a teaching position at Southern Connecticut, and we wish to test this in a way that is least costly and risky for Mr. Stolberg.* However, this would be no problem if the defendants and your office would take no action upon his return. Have you any precedent or earlier opinions, one way or the other, on the question whether Article 3, Section 11 covers someone teaching at a State College?

(Emphasis added). The letter is hardly consistent with the present posture of appellant that the prior judgment compelled salary payment despite the dual job ban and in fact indicates a full recognition that further litigation to test the applicability of the dual job ban to Stolberg would be necessary. In response, the Assistant Attorney General forwarded a copy of the prior adverse opinion of the Attorney General of February 9, 1971 with a covering letter which stated:

> I am sure that you did not intend to ask that the Office of the Attorney General make any commitments, other than on behalf of the defendants. I am confi-

dent that you will render your client your usual sound legal advice on any questions he has raised.

The record and the exchange of correspondence to which we have referred demonstrate that not only the court but also counsel for both parties believed that the Attorney General was not prevented from raising the dual job ban when and if Stolberg returned to SCSC while still a member of the General Assembly. In fact, counsel for Stolberg indicated that the issue would have to be tested. Despite that recognition, the procedural tactic here adopted sought instead to circumvent any determination of the issue on the merits by recourse to a res judicata theory. In our view, the effort was properly thwarted below.

Appellant urges that the judgment rendered in the initial action is binding not only upon the president and Board of Trustees of SCSC but also upon those in privity with them. Hence, it is contended that the state officials named in the order to show cause, but not joined as defendants in the underlying action, should be held in contempt. This is a point we need not address since we have held that res judicata principles are not appropriately applied here. Judge Blumenfeld explicitly held that his judgment did not preclude the state from raising the dual job ban issue. As he indicated, that question is most appropriately litigated in the state courts where in fact it is now sub judice with a host of state officials, omitted as party defendants in the federal action now named as defendants therein.

For the reasons given the judgment below is affirmed.

MANSFIELD, *Circuit Judge* (Dissenting):

I dissent. If ever a case was governed by the doctrine of *res judicata,* this is it. In 1971, *after* plaintiff had become a member of the Connecticut General Assembly, the Attorney General of that state, as the representative of the Trustees of the State Colleges of the State of Connecticut (SCSC), deliberately waived Connecticut's dual-job ban as a defense to plaintiff's suit for reinstatement to SCSC. The Attorney General's motive for his waiver is best known to himself. Possibly he considered his other defenses, which have since failed, to be quite adequate standing alone. Whatever his reason, the record is unequivocally clear that his waiver was the only reason why the defense was thereafter "not in the case" and why the issue, as the majority concedes, was "deliberately eliminated from the case."

The majority now reaches a bizarre conclusion. Despite the Attorney General's earlier waiver of the dual-job ban defense, it holds that he now may litigate the issue though the case has been tried and the state's other defenses have failed. The effect is to violate the very purpose of the doctrine of *res judicata,* which was designed to discourage just such belated piecemeal assertion of defenses that *might* properly have been raised during trial, regardless whether they were, as here, deliberately waived. A waiver provides an *a fortiori* case for application of the doctrine.

The result of today's decision is, to say the least, extraordinary. The state, having lost the lawsuit, has been ordered to restore the successful plaintiff to his position as assistant professor at a state university. Thus, irrespective of his membership in the state legislature, the order entitled him to hold this teaching position, arguably an "appointive position or office in the . . . executive department of the state government," despite the state's

dual-job ban, which prohibits a member of the legislature from holding or accepting an appointive position or office in the judicial or executive department of the state.[1] Yet the majority, while affirming his entitlement to status as an assistant professor of SCSC under our order, holds that the state may refuse to pay him the salary associated with his duties. Unless the plaintiff were willing to offer his services as charity to the state, which he is not, his legal victory has largely been turned into a pyrrhic one. Because I cannot easily subscribe to the bizarre conclusion that an order of reinstatement means reinstatement without pay, I must register my disagreement with the majority.

As the majority recognizes, the doctrine of *res judicata* applies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948) (citation omitted); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 378 (1940); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1876); *Boruski* v. *United States*, 493 F.2d 301, 304 (2d Cir.), *appeal dismissed*, 419 U.S. 809 (1974); 1B Moore's Federal Practice ¶.405[3], at 631. Connecticut's dual-job ban law is precisely the sort of "admissible matter which might have been offered" to "sustain or defeat [appellant's] claim." Indeed, under the Attorney General's interpretation of the Connecticut Constitution and dual-job ban statute, once appellant was elected to the state legislature

1 As the majority notes (p. 3), the state's position is "under *State ex rel. Butera* v. *Lombardi*, 146 Conn. 299, 150 A.2d 309 (1959), when Stolberg became a member of the General Assembly [on January 6, 1971] he surrendered his position at SCSC and could not hold his position as assistant professor at that institution." However, by permitting Stolberg to remain in the latter position pursuant to our earlier order, the majority implicitly rejects this argument.

in 1970, that law constituted a complete defense to his suit for reinstatement to his teaching post as ultimately ordered by the district court in 1972. Any doubt that defendants in the original action fully recognized the "essential" nature of this defense, *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 459 (1922), is dispelled by the Pretrial Memorandum submitted by the Attorney General, in which he explicitly argued:

> "When the plaintiff became a member of the General Assembly of the State of Connecticut, he became ineligible for the orders he seeks. The Connecticut Constitution Article III, Section 11 provides:
>
> "'No member of the general assembly shall during the term of which he is elected, hold or accept any appointive position in the judicial or executive department of the state government. . . .'
>
> "Section 2-5 of the Connecticut General Statutes provides:
>
> "'No member of the general assembly shall, during the term for which he is elected, be nominated, appointed or elected by the governor, the general assembly or any other appointing authority of this state to any position in the judicial, legislative or executive department of the state government. . . .'
>
> "Thus, even if the plaintiff had been a teacher with tenure, upon becoming a member of the general assembly he would have to resign his position as a teacher. Even a 'leave of absence' would not be sufficient as this would be merely 'a vacation without pay'. Pursuant to the aforementioned rules of the Board, any teacher, even one who has been granted tenure, who leaves the State College system loses his tenure;

in the event he again is employed by the State College system he must again become a probationary teacher and go through the working test period. Therefore, even if this Court should decide the factual and substantive legal issues in favor of the plaintiff, it cannot grant the mandatory injunctive relief sought because the plaintiff has voluntarily cut himself off from his prior period of employment."

In reliance upon this argument, the court's Pretrial Report dated April 22, 1971, which was approved and "So Ordered" by District Judge Zampano on May 5, 1971, expressly provided that within seven days the defendant would file an amendment to its answer, adding the dual-job ban as a "special defense." However, the Attorney General thereafter chose not to add this defense or to raise it during the December, 1971, trial before Judge Blumenfeld or in the defendants' Post-Trial Brief.

The very legal authorities upon which both defendants and the majority opinion today belatedly rely as support for application of the dual-job ban to Stolberg—an earlier opinion of the Attorney General's Office dated February 9, 1971 and the case of *State ex rel. Butera* v. *Lombardi*, 146 Conn. 299, 150 A.2d 309 (1959)—were fully available to the defense before the original district court litigation reached either the trial or judgment stages. In light of the Attorney General's failure to raise the defense as mandated by the pretrial order, the defense must be deemed to have been waived. The Attorney General's recent attempt to circumvent the 1972 district court judgment by withholding Stolberg's salary in reliance upon the dual-job ban constitutes a clearcut contempt of the court's order of reinstatement.

To counter this striking evidence that the Attorney General was obliged to raise the dual-job ban defense in order

to avoid truncated and repetitious litigation but simply decided not to do so the court offers several arguments. First, it refers to Judge Blumenfeld's understanding that the original litigation did not present the dual-job ban question and, more specifically, emphasizes his brief comment at the end of the trial in December, 1971, regarding the defense: "So it's not in the case." Certainly it is true that by the time the case reached Judge Blumenfeld for trial the dual-job ban was nowhere to be found in the pleadings or argument. But this is attributable entirely to the Attorney General's decision not to comply with that part of the pretrial order of Judge Zampano which authorized and directed the filing of an answer raising this defense.

The majority conveniently construes Judge Blumenfeld's remark as sanctioning an agreement or order to save or postpone the dual-job ban defense for another day. However, since the defense, if successful, would be an absolute one, the majority makes no attempt to rationalize its deferment, apparently recognizing that this would indeed be a difficult feat in the absence of a stipulation or order approved by the court, which is the normal procedure followed where the court and parties desire piecemeal trial of separate but interrelated issues. Moreover, when the court's remark is read in context, it is obvious that the court was not indicating that the defense had been preserved for the future but was merely responding to a statement by plaintiff's counsel that "There was to have been a defense filed by the defendant having to do with the plaintiff's position in the legislature and that was never filed." Thus, even when Judge Blumenfeld's remark is viewed most favorably to the defendants, it amounted at most to a neutral observation regarding the defendants' failure to raise the defense for consideration

by the court. In fact if the majority is correct in asserting that the 1972 litigation did not settle the dual-job ban issue, it is difficult to justify Judge Blumenfeld's award of compensatory damages totalling $9,000 to cover Stolberg's lost salary for a time period when he was openly holding membership in the state legislature.

The majority next seeks to place some of the responsibility for the state's waiver of the dual-job ban defense upon Stolberg's failure to "press the point." But it is both unrealistic and inappropriate to expect a plaintiff to "press" the defendants' defenses, especially when, as here, the Attorney General stood mute and failed either to raise the issue at trial or to forthrightly reserve the question for later consideration. Simply to permit state officials to reassert the dual-job provision more than two years after the district court's judgment was entered and some three months after Stolberg altered his professional position and returned to SCSC is to "disturb . . . or revise . . . legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952).

Nevertheless, the majority here argues that the failure to raise the dual-job ban is "perhaps understandable" since "it was not inevitable" that Stolberg would return to teaching at SCSC and therefore the dual-job ban question might never need to be resolved. This contention apparently stems from the fact that after his unlawful termination from SCSC, Stolberg located a substitute teaching position at Quinnipiac College and "did not even seek to return to the [state] college until . . . more than two years after the judgment had been entered." But the record belies any suggestion that the parties or court believed that Stolberg was not seriously seeking reinstatement as promptly as

could be arranged. His complaint expressly demanded reinstatement, defendants' Pretrial Memorandum treated reinstatement as the primary relief in issue, and the district court's award provided for such relief. At the close of trial, the Assistant Attorney General essentially admitted error and announced in open court that defendant was prepared to grant Stolberg reinstatement with tenure. In response, Stolberg's attorney made clear that, in light of Stolberg's prevailing commitments to Quinnipiac, the only uncertainty concerns "what period of time he can come back [to SCSC]," not whether he would seek to return. Appellant's two-year delay in resuming his teaching duties at SCSC is fully explained by his need to fulfill the outstanding academic commitments that he had made to this other institution and the failure of the SCSC Board of Trustees until June, 1972, to formally authorize his reinstatement, after prompting by Stolberg some two months earlier.

Thus, there is little room for doubt that as of June, 1972, the dual-job ban represented an essential defense to Stolberg's action for reinstatement, which had been waived, and that all parties fully contemplated Stolberg's return to SCSC. The majority's final argument, therefore, follows a somewhat different path. Even though reinstatement had been ordered in 1972, the majority argues, a June 26, 1973, letter from appellant's counsel to the Attorney General demonstrates that appellant understood that the prior judgment of reinstatement did not compel the payment of salary. However, this puts a most unnatural and strained interpretation upon the letter, which states not a word about the possibility of the state's withholding salary. The most that can be inferred from the letter is that appellant may have had misgivings as to whether the Attorney General's waiver, which had clearly applied to Stolberg's 1971-72 term in the legislature, would extend to his current

(1973-74) and successive legislative terms. In short, he understandably did not want to relinquish his salaried position at Quinnipiac College (which was not subject to the dual-job ban) in order to resume his post at SCSC until the state's position with respect to the future was clarified. Any doubts about the scope and duration of the Attorney General's waiver and whether Stolberg's reinstatement would be treated as an issue separate and apart from his right to receive his professor's compensation if he should be re-elected to the legislature in 1974 were dispelled by the Attorney General's response of July 10, 1974, in which he invited Stolberg to return to SCSC at the relevant pay level, whether he resumed his post in the 1973-74 school year or the 1974-75 school year, as follows:

> "What action will the Attorney General or the defendants take if Professor Stolberg maintains his seat in the legislature and accepts reinstatement at Southern Connecticut State College? The defendants have been ordered to reinstate the plaintiff with the same seniority as if the contract had been renewed in 1969. *You have received Doctor Jennings' letter which states the pay grades for assistant professor* . . . . The defendants seek to comply not only with the letter of Judge Blumenfeld's order, but with the spirit of his order, as well. The defendants are holding open the doors to SCSC *whether Professor Stolberg decides to return of the 1973-1974 school year or the 1974-1975 school year.*" (Emphasis added).

Thus the State of Connecticut, through its Attorney General, understood the district court's order of reinstatement to mean reinstatement with pay, at least through the 1974-75 school year.

On the strength of the Attorney General's response, appellant in 1974 returned to his teaching duties at SCSC and until November 8, 1974, was paid the salary attaching to the post to which he had been reinstated, whereupon the Comptroller, upon advice from the same Attorney General, refused thereafter to pay the salary associated with his position. Although it is true, as appellees argue, that only the Trustees were served as party defendants in the original suit, the Comptroller nevertheless has the legal responsibility of paying the salaries of faculty as certified by the Trustees, and the Attorney General represented the Trustees before the district court. In light of these closely defined legal relationships and the existence of actual notice of the court's order to all relevant state agencies, both the Comptroller and the Attorney General should fall within the reach of Rule 65(d), F.R.C.P., which insures that

> "a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding."

Regal Knitwear v. *NLRB*, 324 U.S. 9, 14 (1945); see *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973); *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832, 833 (2d Cir. 1930) (L. Hand, *J.*) ("the respondent must either abet the defendant, or must be legally identified with him"). See generally 7 Moore's Federal Practice ¶65.13. This privity rule applies with equal force to governmental bodies, as the Supreme Court noted as early as 35 years ago:

> "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between the party and another officer of the government."

Sunshine Coal Co. v. *Adkins*, 310 U.S. 381, 402-03 (1940); see *Tait* v. *Western Maryland Ry. Co.*, 289 U.S. 620, 626-27 (1933). In fact, in this age of expansive government, it is not easy to ignore the dire legal and social consequences if a government bureaucracy were freely permitted to fragmentize itself into discrete units and to structure the lines of authority in such a fashion as to circumvent compliance with a valid court order.

For the foregoing reasons I would direct the district court to hold both the Comptroller and the Attorney General in civil contempt of the court's judgment unless they forthwith repay Stolberg's withheld salary and resume regular payments. However, although the state has clearly waived the dual-job ban with respect to the terms in the Connecticut legislature held by Stolberg to date, it has now served notice that it does not intend to waive the defense if Stolberg should be re-elected in November, 1976, to a two-year term beginning in January, 1977. Accordingly, I would hold that the district court's order does not extend beyond Stolberg's current term in the legislature.

APPENDIX B

Judgment Entered June 25, 1975, by the United States District Court for the District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13,591

IRVING STOLBERG

v.

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES, *et al.*

Judgment

This cause having come on for consideration on plaintiff's Application and Petition for Issuance of Order to Show Cause and for Contempt Judgment, and the Court (Blumenfeld, J.) having rendered a Memorandum of Decision under date of June 23, 1975, denying said motion for a contempt judgment,

It is ORDERED and ADJUDGED that judgment be and is hereby entered denying the motion for a contempt judgment.

Dated at New Haven, Connecticut, this 25th day of June, 1975.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By /s/ FRANCES J. CONSIGLIO
Deputy in Charge

APPENDIX C

Memorandum of Decision, Rendered Under Date of June 23, 1975, by the United States District Court for the District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13,591

IRVING STOLBERG

v.

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES, *et al.*

Memorandum of Decision

Memorandum of Decision

In February 1972 an opinion in this case found that the defendants had impermissibly retaliated against Stolberg for exercising his first amendment rights by refusing to renew his teaching contract at Southern Connecticut State College (SCSC) for the 1969-70 academic year. The defendants were ordered to "promptly offer to reinstate the plaintiff as a faculty member with tenure."[1] In the fall of 1974 Stolberg returned to work at SCSC. At that point Stolberg was, as he had been since 1970 and as he continues to be, a member of the Connecticut General Assembly. State auditors last fall concluded that Stolberg was in violation of Connecticut's dual-job ban, Conn. Const. art. III, § 11, by reason of holding these two positions. The defendant board of trustees refused to take any action with respect to Stolberg's alleged violation of the dual-job ban because of the court order in this case. The state Attorney General, by formal letter of advice dated October 28, 1974, agreed with the auditors' conclusion. The state Comptroller, on the basis of this opinion, commenced to withhold Stolberg's paycheck as a faculty member at SCSC. The board of trustees has continued to submit Stolberg's name on the payroll each pay period; the Comptroller has continued to refuse to issue a check.

On December 16, 1974, Stolberg came here seeking a contempt judgment against the defendant board of trustees plus the Governor, the Comptroller, the Attorney General,

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[1] Other relief was also given, but is not relevant here. The Second Circuit affirmed in part and reversed a portion not here material. *Stolberg* v. *Members of the Board of Trustees*, 474 F.2d 485 (2d Cir. 1973).

the auditors, and certain subordinate state employees. He sought to have these respondents enjoined from interfering with his employment at SCSC and ordered to pay him the money so far withheld.

Since December 16 the parties have been busily briefing this case, delving into such issues as the power of the court to find in contempt those not parties to the original action, the applicability of the abstention doctrine, the applicability of the dual-job ban to Stolberg, and many other points. By mid-April the plaintiff had filed almost 300 pages of briefs, and an equally imposing stack of affidavits, exhibits, and stipulations. The defendants were given until June 2 to respond, and did so within that time. On June 11 the plaintiff filed a motion for an interim order that Stolberg must be paid his salary until the motion for a contempt order was adjudicated. The defendants have now requested additional time to respond to this motion.

I believe that it is time for the court to derail this somewhat incredible train of pleadings before it gets sidetracked further than it has already (if that be possible).

The point of the judgment that the board offer to reinstate Stolberg was to put him in as good a position as he would have occupied but for the unconstitutional infringement of his first amendment rights. Although the judgment did not explicitly indicate that no decision on the merits of a dual-job ban claim had been made, I indicated to the parties in open court that I did not regard this issue as being in the case.[2] Transcript 173. Now Stolberg seeks

[2] The plaintiff argues that the issue was in the case because the defendants were specifically authorized to plead the dual-job ban as a defense by the special masters pretrying the case. (Their report was "so ordered" by the court.) The defendants did not subsequently raise the defense, however, nor was the dual-job ban "essential to the decision" of the case. *Cf. United States Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 459 (1922). There is, therefore, no compulsion to regard the dual-job ban as an issue litigated in the earlier proceedings.

to use the judgment not as a shield against interference with his constitutional rights but as a sword predicated on grounds not litigated in the prior proceedings. This he may not do. The judgment is hereby clarified to indicate that it does not prejudice the state's right to assert its constitutional dual-job ban against Stolberg. Any complaints Stolberg may have about the assertion of this ban must be raised in a separate proceeding (most appropriately brought in the state courts). The motion for a contempt judgment is denied. It is

So Ordered.

Dated at Hartford, Connecticut, this 23rd day of June, 1975.

M. Joseph Blumenfeld
United States District Judge

APPENDIX D

Opinion of the United States Court of Appeals in Decision of January 29, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 217—September Term, 1972.

(Argued December 6, 1972 Decided January 29, 1973.)

Docket No. 72-1726

IRVING STOLBERG,

Plaintiff-Appellant,

—against—

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, et al.,

Defendants-Appellees.

Before:

LUMBARD, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal by plaintiff from a judgment in his favor rendered by the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Chief Judge,* sitting without a jury in an action under the Civil Rights Act, 42 U.S.C. §1983, finding that plaintiff was discharged in retaliation for his exercise of his First Amendment rights and directing defendants to offer him reinstatement as a faculty member with tenure and no loss of seniority and awarding him compensatory damages for wage loss, but denying damages for mental stress, humiliation and injury to reputation, punitive damages and attorneys' fees.

Affirmed in part, reversed in part, and remanded for determination of reasonable counsel fees.

LOUIS M. WINER, Esq., New Haven, Conn. (Tyler, Cooper, Grant, Bowerman, & Keefe, Irving S. Schloss, Esq., New Haven, Conn., of counsel), *for Plaintiff-Appellant.*

SIDNEY D. GIBER, Assistant Attorney General (Robert K. Killian, Attorney General, F. Michael Ahern, Assistant Attorney General, Hartford, Conn., of counsel), *for Defendants-Appellees.*

MANSFIELD, *Circuit Judge:*

Irving Stolberg, formerly an Assistant Professor of Geography at Southern Connecticut State College ("SCSC"), appeals from a judgment in his favor in his action under the Civil Rights Act, 42 U.S.C. §1983, against the former President of SCSC and members of the Board of Trustees for the State Colleges of Connecticut based on their nonrenewal of his teaching contract and consequent denial of tenure, allegedly in violation of his First Amendment and Due Process rights. The district court, M. Joseph Blumenfeld, Chief Judge, sitting without a jury, found defendants' action to have been in retaliation for Stolberg's exercise of his First Amendment rights and awarded him reinstatement with tenure and no loss of seniority and $9,000 to cover his salary loss. However, he denied additional compensatory damages, punitive damages or attorneys' fees. The court found it unnecessary, in view of its disposition of the First Amendment claims, to decide whether Stolberg had also been denied procedural due process.

Stolberg here contends that the district court should have decided his due process claims and should have awarded him additional compensatory damages for humiliation, emotional distress, and injury to his reputation, plus punitive damages and attorneys' fees.[1] We affirm except as to the denial of attorneys' fees, which we reverse, and we remand for determination and award of reasonable attorneys' fees.

The findings of the district court, made in an unreported decision,[2] are not disputed. They reveal an unpleasant picture, characterized by reactionary and rather high-handed conduct on the part of a college president toward a faculty member, approved by some trustees and tolerated by others. Beginning with the 1966-1967 school year Stolberg, a graduate of the University of California at Los Angeles, with a distinguished academic record, was employed by SCSC as an Assistant Professor. Under existing regulations and practice at SCSC, teachers who satisfactorily completed three years in probationary status were entitled to tenure.

In February, 1968, as part of his active participation in discussions regarding international political affairs, particularly our country's involvement in the war in Vietnam, Stolberg sent to his fellow faculty members at SCSC an invitation to support a Peace Program and Memorial Service to be held in New Haven relating to that war. Two months earlier Stolberg had sent a letter to the President of Albertus Magnus College in New Haven suggesting that she had arbitrarily suspended a number of students and offering the mediation services of The American Associa-

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1 After such additional sums had been denied at trial, appellant moved under Rules 52 and 59, F.R.Civ.P., for amendment of Chief Judge Blumenfeld's findings and judgment to include these items of relief. The motion was denied.

2 *Stolberg* v. *Members of the Board of Trustees*, Civil No. 13,591 (D. Conn. Feb. 29, 1972).

tion of University Professors, a local chapter of which Stolberg was then President.

Dr. Hilton C. Buley, President of SCSC, whose views apparently differed sharply from those of Stolberg, whom he seems to have regarded as subversive, did not take kindly to Stolberg's communications. Buley promptly notified Stolberg that his contract would not be renewed for the coming year, 1968-1969, which would have been his third year on the faculty.

Stolberg unsuccessfully appealed President Buley's decision to the personnel committee of the Board of Trustees for the State College and subsequently requested the Board to reconsider his case, claiming that the committee's procedures did not comport with the requirements of due process. The Board then sought advice from the State Attorney General, who expressed the opinion that the Board proceedings upholding Buley's decision were not legally sound in view of the appeal clause in the Board's Personnel Policies. President Buley thereupon volunteered to rescind Stolberg's termination, and Stolberg continued on the faculty during the 1968-69 term. Buley, however, sought to have the clause repealed with the intention of dismissing Stolberg thereafter.

The Board, fearing discontent among the faculty, decided against repeal of the appeal procedure in December, 1968. Nonetheless, on February 27, 1969, Buley again notified Stolberg, without reasons, that his contract would be terminated at the end of the term and tenure thereby denied, despite recommendations from the chairman and members of the geography department that he be given tenure. Stolberg again appealed to the Board's Personnel Committee and was allowed to appear personally before them, although he received no notice of any charges against him. Dr. Buley appeared *ex parte* before the Board two weeks

later, without notice to Stolberg, and listed several "incidents" as the basis for the latter's dismissal.

The Board subsequently affirmed Buley's decision on June 13, 1969. This action was filed by Stolberg on December 15, 1969. At no time during the course of administrative or judicial proceedings regarding Stolberg's termination was his competence as an instructor questioned.

At the conclusion of the trial, at which no defense was presented, Chief Judge Blumenfeld held that the "incidents" listed by Buley had been makeweights and that the real reason for not renewing Stolberg's teaching contract was his previous exercise of his First Amendment rights, a constitutionally impermissible basis for dismissal, *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). Judge Blumenfeld directed the Board of Trustees to reinstate Stolberg as a faculty member at SCSC with tenure and without loss of seniority, and awarded judgment in the sum of $9,000 against Dr. Buley and certain of the individual members of the Board to compensate Stolberg for his intervening salary loss. Neither the relief granted nor the basis on which it was predicated are challenged on appeal by the defendants. Stolberg, however, challenges the sufficiency of the relief granted in his favor, for the above stated reasons.

We conclude that it was entirely proper for Chief Judge Blumenfeld not to adjudicate appellant's additional claim that he was deprived of his livelihood through procedures lacking in due process. Though Stolberg claims he suffered additional harm, based on a due process denial, through loss of an earlier opportunity to clear himself before the Board of Trustees of unsupported charges against him, made *ex parte* to the Board by Dr. Buley, any resulting injury to reputation would have been compensable, if proved, and fully remediable as a consequence of the non-

renewal of his teaching contract in retaliation for his lawful exercise of his First Amendment rights. See *Donovan* v. *Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970); *Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290, 293 (5th Cir. 1970); *cf. Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 238-40 (1969).

Thus a decision of the due process claim was not necessary to accord Stolberg whatever relief he was entitled to on that claim. The most he lost by reason of the court's failure to decide it was the inability to achieve the personal satisfaction of obtaining a finding that his Due Process as well as his First Amendment rights had been violated. This would not mandate a decision. Furthermore, the subsequent decisions of the Supreme Court in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), the pendency of which was noted by Judge Blumenfeld, and in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), confirmed the district court's observation that the serious question of what procedural process is due before administrators of public educational institutions may decline to renew contracts of tenured and nontenured teachers, involves complicated subissues that are not easily answered. Under these circumstances, it was entirely proper for Judge Blumenfeld not to "anticipate a question of constitutional law in advance of the necessity of deciding it," *Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

We turn then to the question of the sufficiency of the relief granted Stolberg. The district court found that following his dismissal from SCSC he was almost immediately able to secure another position at a lower salary as an instructor of geography at another college and was elected to the Connecticut House of Representatives from the district encompassing SCSC. The award to him of $9,000 in compensatory damages represented the difference in earn-

ings between the salaries he would have earned at the two colleges. Additional compensatory damages for humiliation, distress, and injury to reputation were denied for failure of proof and because any such damage would be "wholly speculative." We agree.

We do not find Judge Blumenfeld's findings to be clearly erroneous, Rule 52, F.R.Civ.P. Neither medical evidence of pain and suffering nor evidence of damage to Stolberg's reputation in his community was introduced, save Stolberg's own testimony of being upset over the whole course of events. Although he testified that he had encountered public damage to his reputation, had been hindered in his election campaign efforts and in his effectiveness later as a State legislator, and had experienced disruption of personally valuable relationships with his former students, other factors, including the relative ease with which he obtained a new position elsewhere and his successful election to the State legislature, tended to negate or minimize any such harm.

The credibility to be accorded the evidence was for Judge Blumenfeld, and it is obvious that some of the alleged injury was too speculative to be compensable in any event. *Donovan* v. *Reinbold, supra* at 743, relied on by appellant, merely indicates that a district court may award damages for emotional or mental distress found to have resulted from loss of a public job to which the holder had an unusual dedication and from which he has been unconstitutionally dismissed, and not that such a finding is to be presumed or found solely on the basis of the plaintiff's testimony.

Similarly we affirm the denial of punitive damages. At the end of the trial in December, 1971, counsel for the trustees stated in open court that the trustees were at that point willing to offer appellant tenure. Largely from this statement, Judge Blumenfeld concluded that an award of

exemplary damages against these State officials was unnecessary to secure "full compliance with constitutional requirements" and might, to the public's detriment, unnecessarily deter responsible citizens from agreeing to serve in the voluntary capacity of members of the Board. While punitive damages may, in an appropriate case, be awarded for violation of 42 U.S.C. §1983, even in the absence of actual damages, see *Basista* v. *Weir*, 340 F.2d 74, 86-88 (3d Cir. 1965); *Mansell* v. *Saunders*, 372 F.2d 573, 576 (5th Cir. 1967); *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968), failure to award such relief will not be lightly overturned. Whether the standard to be applied in the first instance for determination of whether punitive damages should be allowed is restricted to instances where "wilful or malicious violations of Constitutional rights" are proved, *Sexton* v. *Gibbs*, 327 F. Supp. 134, 142-43 (N.D. Tex.), *aff'd.*, 446 F.2d 904 (5th Cir. 1971), or where "a defendant has acted wilfully and in gross disregard for the rights of the complaining party," *Lee* v. *Southern Home Sites Corp., supra* at 294 (action under 42 U.S.C. §§1981, 1982), or should be extended to instances where the defendant acted with knowledge that he was violating the plaintiff's rights or with reckless disregard of whether he was violating such rights, see *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 233-34 (1970) (opinion of Brennan, J.), appellate review of the district court's determination should necessarily be circumscribed.

> "The allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact." *Lee* v. *Southern Home Sites Corp., supra* at 294.

Here Judge Blumenfeld concluded that the award of punitive damages would be unwarranted, unwise and unnecessary. There was ample support for his exercise of discretion.

The failure to award reasonable attorneys' fees rests on a somewhat different footing, and we believe that such relief should have been granted. With respect to the issue of whether to award attorneys' fees, the emphasis is not placed solely on whether the defendants should suffer pecuniary punishment or be additionally deterred. Rather the objective is to assure that the plaintiff, and others who might similarly be forced to great expense to vindicate clear constitutional claims, are not deterred from securing such vindication by the prospect of costly, protracted proceedings which have become necessary only because of the obdurate conduct of the defendants. It is especially important to assure that a healthy climate of free expression is not inhibited "in the community of American schools," *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960).

The circumstances of this case persuade us that an award of counsel fees is necessary to protect against the possibility that other faculty members might be reluctant to engage in activities protected by the First Amendment or might forgo the vindication of their rights to do so in a court of law. Such a result would be destructive of the educational process in a free society. When, as here, the constitutional right is one of great importance and proof of an intentional and serious violation is clear and definite, enforcement should not be inhibited by reason of litigation costs.

The district judge denied attorneys' fees primarily on the ground that the only purpose to be served in awarding damages was individual redress, see *Arroyo* v. *Walsh*,

317 F. Supp. 869, 873 (D. Conn. 1970). He concluded that such an award was rendered unnecessary because the trustees were willing to offer Stolberg tenure at the end of the trial and because the court had now issued a ruling for the future guidance of the defendants.[3] However, application of established principles to the district court's own findings shows that the standard for awarding attorneys' fees was fully met.

Although the award of attorneys' fees is restricted to the exceptional case, see, e.g., *Bell* v. *School Board*, 321 F.2d 494, 500 (4th Cir. 1963), the standard is whether "bringing the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy," *Bradley* v. *School Board*, 345 F.2d 310, 321 (4th Cir.), *vacated on other grounds*, 382 U.S. 103 (1965); *Monroe* v. *Board of Commissioners*, 453 F.2d 259, 263 (6th Cir.), *cert. denied*, 406 U.S. 945 (1972). The Supreme Court has furthermore recognized that "a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons,' 6 Moore's Federal Practice 1352 (1966 ed.)." *Newman* v. *Piggie Park Enterprise, Inc.*, 390 U.S. 400, 402 n.4 (1968) (per curiam). Because suit clearly should have been unnecessary in this case and was compelled by defendants' conduct, counsel fees should have been awarded.

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3 The district judge was also concerned that since the members of the Board of Trustees serve voluntarily the award of attorneys' fees and punitive damages would, if granted, inhibit responsible citizens from performing valuable services for public institutions. The Assistant State Attorney General represented at the oral argument of this appeal that if attorneys' fees were assessed against the defendants he would seek to have them reimbursed by the State. See Conn. Gen. Stats. §10-235 (1972 Supp.). In any event, we do not believe that this factor should prevent the necessary protection of the clear First Amendment freedoms of faculty members at the State colleges.

Stolberg was originally notified by Dr. Buley in February, 1968, that his contract would not be renewed, for reasons that were found to be constitutionally improper and which have never been seriously contested by defendants. Judge Blumenfeld found that at the hearing on Stolberg's first appeal to the Board of Trustees he was "questioned solely about his political and moral convictions. There was no discussion of his competency as a teacher." Despite the subsequent advice of the Attorney General that the appeal proceedings were not legally sound, and the observation of the Board's Personnel Committee in December, 1968, that "in the absence of evidence more convincing than that presented last year, the Committee concluded that it could not support the President (Buley) in dismissing Irving Stolberg," the committee in June, 1969, did affirm the second dismissal of Stolberg. Furthermore, the dismissal followed an *ex parte* appearance of Dr. Buley, at which he listed several "incidents" as the basis for dismissal, all later found by Judge Blumenfeld to be a mere facade.

When Stolberg was ultimately forced to sue for reinstatement in December, 1969, his suit was vigorously opposed through extensive discovery proceedings and until the end of the trial two years later, in December, 1971. It was not until that point, some 3½ years after the first improper failure to renew Stolberg's contract, that the defendants, after failing to present any defense to appellant's case, finally offered to reinstate him with tenure.

Nor was the belated offer of reinstatement delayed because of any doubt about the legal rights of appellant at the time of the Board's initial decision to approve dismissal. Compare *Kelly* v. *Guinn*, 456 F.2d 100, 111 (9th Cir. 1972); *Monroe* v. *Board of Commissioners*, *supra* at 263. Rather the situation was governed by the well estab-

lished principle, recently reaffirmed in *Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972), where the Supreme Court stated that it had "twice before . . . specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton* v. *Tucker*, *supra* [1960]; *Keyishian* v. *Board of Regents*, *supra* [1967]."

Judge Blumenfeld, in considering whether defendants were state officials who had a defense of good faith to an action for damages under §1983, *cf. Pierson* v. *Ray*, 386 U.S. 547, 555 (1967), found it unnecessary to decide that question because "the court does not find that the defendants here have established that they acted in good faith." Under these circumstances, where the constitutional rights of the appellant were clear at the time of the appellees' conduct, as well as at the time of suit, where the long course of vindication of those rights caused by the appellees should, as a consequence, have been unnecessary, and where the award of fees will help prevent inhibition of the future exercise of such rights at public institutions by other public employees, the financial burden of litigation should be removed "from the shoulders of the plaintiff seeking to vindicate the public right." *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972). See also *Lee* v. *Southern Home Sites Corp.*, *supra* at 147-48.

Affirmed in part, reversed in part, and remanded for determination of reasonable attorneys' fees. The costs of this appeal are awarded to appellant.

APPENDIX E

Judgment Entered March 7, 1972, by the United States District Court for the District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13,591

IRVING STOLBERG

v.

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, *et al.*

Judgment

This action came on for trial before the Court, the Honorable M. Joseph Blumenfeld, Chief Judge, United States District Court, presiding, and the issues having been duly tried and a decision having been duly rendered on February 29, 1972,

It is ORDERED and ADJUDGED:

(1) That the defendant board of trustees promptly offer to reinstate the plaintiff as a faculty member with tenure at Southern Connecticut State College for the 1972-1973 academic year with the same seniority as if his contract had been renewed in 1969;

(2) That the plaintiff recover of the defendants Hilton C. Buley, Clark Edwin Creed, Thomas A. Grasso, Richard Gurney, Margaret Gurney, Bernice C. Niejadlik, Alvin V. Wood and J. Eugene Smith the sum of Nine Thousand Dollars ($9,000.00) as compensatory damages; and

(3) That the plaintiff recover no compensatory damages of the defendants Frank P. Cammarano, Russell Fitz, Ernest A. Johnson, Laura Johnson, James F. McNally, John F. Robinson and Walter Werner.

Dated at New Haven, Connecticut, this 7th day of March, 1972.

GILBERT C. EARL
Clerk, United States District Court

By /s/ FRANCES J. CONSIGLIO
Deputy in Charge

APPROVED:

/s/ M. JOSEPH BLUMENFELD
Chief Judge, United States District Court

APPENDIX F

Memorandum of Decision, Rendered Under Date of February 29, 1972, by the United States District Court for the District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13,591

IRVING STOLBERG

vs.

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, *et al.*

Memorandum of Decision, Findings of Fact and Conclusions of Law

Memorandum of Decision, Findings of Fact and Conclusions of Law

The plaintiff in this case, Irving Stolberg, complains that his teaching contract at Southern Connecticut State College (SCSC) was not renewed for the school year 1969-70 and that he was thereby denied tenure in retaliation for the exercise of first amendment rights. He seeks equitable relief, in the form of reinstatement, and compensatory and punitive damages against the former president of SCSC and the members of the board of trustees for the state colleges of Connecticut at the time of the alleged wrong. He brings this action under 42 U.S.C. § 1983.[1] The court is vested with jurisdiction by 28 U.S.C. § 1343 (3). See *Tichon* v. *Harder,* 438 F.2d 1396, 1400 (2d Cir. 1971), and cases cited therein.

I.

The plaintiff was employed as an instructor in geography at SCSC beginning with the 1966-67 school year. During this year and the subsequent year he became involved in a variety of civil rights activities and organized opposition to the Vietnam war. Under the existing regulations and practice, teachers who satisfactorily completed three years in probationary status were given tenure.

[1] 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Memorandum of Decision, Findings of Fact and Conclusions of Law

In February 1968, during the plaintiff's second year at SCSC, the defendant Buley, then president of the college, informed the plaintiff that his contract would not be renewed for the 1968-69 school year. He gave three reasons for nonrenewal: (1) the plaintiff had sent a letter three days earlier to fellow teachers at the college inviting them to participate in a demonstration in New Haven, Connecticut, against the Vietnam war; (2) the plaintiff on December 1, 1967, had sent a letter to the president of Albertus Magnus College in New Haven suggesting that she had arbitrarily suspended a number of students and offering the mediation services of the American Association of University Professors, a local chapter of which the plaintiff was then president; (3) complaints (never substantiated) had been made by a cafeteria worker that the plaintiff had not paid for certain cups of coffee on the "honor system" in the school cafeteria. Buley also stated that the plaintiff did not "fit" at SCSC. There was considerable testimony at trial to the effect that an ideological gulf existed between the plaintiff and Buley; and statements by Buley to the board of trustees implied that he deemed the plaintiff a subversive influence who had been trained to manipulate "a small hard core of militant students."

The plaintiff appealed Buley's decision to the personnel committee of the board of trustees, charging that his contract was not being renewed because of his political beliefs. The plaintiff appeared before the committee at a lengthy hearing on June 5, 1968, at which he was questioned solely about his political and moral convictions. There was no discussion of his competency as a teacher.

Memorandum of Decision, Findings of Fact and Conclusions of Law

Under the applicable regulations a probationary teacher could be dismissed upon receiving two unsatisfactory service ratings within a given time period or for unprofessional conduct after a full investigation. The plaintiff was never given an unsatisfactory rating; and the misconduct with which he might have been charged[2] was never fully investigated.

Subsequent to the hearing before the personnel committee on June 5, 1968, the board of trustees affirmed Buley's decision. The plaintiff thereupon asked for reconsideration on the ground that the procedures employed by the committee violated due process of law.

At this point the records of the board of trustees show that the board sought the advice of the Attorney General of the state. In several meetings with various segments of the board, the Attorney General stated his opinion that the board had proceeded illegally in upholding Buley's decision. According to the minutes of the board of trustees, at a meeting in July:

> "the Attorney-General again expressed his opinion of the proceedings of the (Personnel) Committee, and he advised President Buley that he had little to stand on in view of the appeal clause in the Personnel Policies of the Board. He also advised that the Board was in a bad position. President Buley thereupon, with the thought that the Board would rescind the appeal clause, volunteered to rescind his notification to Stolberg of the previous February."

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[2] The plaintiff was not told by the board of trustees what the charges were against him or the evidence upon which they were based, nor was he allowed to confront the defendant Buley, who met with the board privately on June 4, 1968.

The plaintiff's termination was rescinded in August 1968, and he continued teaching at SCSC during the 1968-69 school year.

Buley made it clear to the board that he would take action not to renew the plaintiff's contract at the end of the 1968-69 school year; and he repeatedly tried to persuade the board of trustees to repeal the clause which gave probationary teachers the right to appeal to the personnel committee decisions terminating them. The minutes of the board state: "It is further the President's wish to dismiss Stolberg after the clause is repealed." Buley's non-renewal of the plaintiff's contract would thus have been unreviewable by the board of trustees. The board of trustees, after considerable deliberation, decided not to repeal the appeal clause in a meeting on December 18, 1968. The minutes of the board indicate that a substantial factor in the decision was:

> "fears that the repeal of the appeal clause in the Personnel Policies would cause a first-class faculty uproar; and further that the subsequent dismissal of Stolberg, whether or not the clause were repealed, might cause an uproar on the campus at Southern and in any case would probably get into the courts."

Buley notified the plaintiff on February 27, 1969, that his contract would not be renewed for the next year and thus he would be denied tenure. Buley stated that the decision was that of a newly formed committee at SCSC, of which he was a member and in which administration officials constituted a majority. Despite numerous requests, the plaintiff was given no reasons for the refusal to renew his

contract. The record shows that he had been recommended for tenure by the chairman of the geography department, as well as by every other faculty member in the department. Testimony at trial by the chairman of the department established that it was highly unusual for a teacher to be denied tenure in the face of such strong recommendation by his department superiors.

The plaintiff again appealed the decision to the personnel committee of the board of trustees. A hearing was held on May 7, 1969, in which the plaintiff was allowed to appear before the committee, although without notice of the charges against him. An observer at the meeting testified that the plaintiff repeatedly asked what were the reasons for his dismissal, if not political; and his questions were met with silence. The defendant Buley appeared before the committee on May 21, 1969; the plaintiff was given no notice of this meeting nor was he allowed to attend. At this time, Buley filed a list of ten "incidents" which were the basis of the plaintiff's dismissal. Since the record shows that Buley had determined far in advance that he was not going to renew the plaintiff's contract, hopefully without the necessity of an appeal, it is unnecessary to dwell at length on these reasons. Most of these "incidents" consisted of speech unrelated to the performance of his duties as a teacher; the most serious was a charge made by a SCSC teacher that the plaintiff had taken two paintings from another SCSC teacher and never returned them. This charge was wholly unsubstantiated. Another "make-weight" charge was that the plaintiff had falsified his original application by not disclosing that he had been prosecuted as a conscientious objector for refus-

ing to submit to induction in the Army. (His conviction was reversed. *United States* v. *Stolberg*, 346 F.2d 363 (7th Cir. 1965).) The plaintiff discussed his prosecution with Buley just after his arrival at SCSC in the Fall of 1966, and Buley stated to the board of trustees that he "let the matter drop." This charge had been made against the plaintiff in the 1968 hearing before the personnel committee, and the minutes of the personnel committee meeting of December 18, 1968, state that: "In the absence of evidence more convincing than that presented last year the Committee concluded that it could not support the president (Buley) in dismissing Irving Stolberg." Nonetheless, on June 13, 1969, the plaintiff was notified by the defendant Smith, the secretary of the board of trustees, that the decision to dismiss him was affirmed.

II.

Although a state is under no constitutional compulsion to provide tenure to a teacher, it may not condition a grant of tenure on a limitation of first amendment rights. The two letters which Buley originally cited as reasons for dismissing the plaintiff certainly constitute protected speech within the holding of *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), and could provide no basis for dismissal. In *Pickering* the Court held that a teacher was denied first amendment rights when dismissed for writing a letter to a newspaper in which he made remarks highly critical of the "totalitarian" policies of the board of education. The Court stated:

> "(A)bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574.

From the foregoing discussion it is clear, and the court so holds, that the real reason that the plaintiff's contract was not renewed was his exercise of his first amendment rights.[3]

III.

The plaintiff seeks both equitable and legal relief. Although the standards of culpability for state agents under 42 U.S.C. § 1983 are by no means settled, a persuasive distinction has emerged between the grounds for equitable and legal relief. A deprivation of federally protected rights by a state official justifies equitable relief, notwithstanding a lack of bad motive on the part of the state agent. See, e.g., *Gouge* v. *Joint School Dist. No. 1*, 310 F. Supp. 984 (W.D. Wis. 1970); *Chase* v. *Fall Mountain Regional School Dist., supra*, 330 F. Supp. at 400. Accordingly, equitable relief in the instant case is clearly appropriate. The court

[3] Although there are serious questions with respect to the adequacy of the procedural due process afforded the plaintiff, cf. *Drown* v. *Portsmouth School Dist.*, 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); *Chase* v. *Fall Mountain Regional School Dist.*, 330 F. Supp. 388 (D. N.H. 1971), upon which more light will soon be shed by the Supreme Court, *Roth* v. *Board of Regents of State Colleges*, 446 F.2d 806, 808 (7th Cir.), *cert. granted*, 404 U.S. 909 (1971), in view of the holding above it is unnecessary to consider these possible procedural deficiencies in this case.

orders that the plaintiff be reinstated in his faculty position at SCSC, with tenure, beginning with the 1972-73 academic year.

With respect to the question of legal relief by way of monetary damages, there is conflicting authority on the question of whether the common law immunity of state officials provides them with a defense of good faith to an action for damages under § 1983. *Compare Pierson* v. *Ray,* 386 U.S. 547, 555 (1967), *with Adickes* v. *Kress & Co.,* 398 U.S. 144, 232-33 (1970) (opinion of Mr. Justice Brennan); *Joseph* v. *Rowlen,* 402 F.2d 367 (7th Cir. 1968); *Whirl* v. *Kern,* 407 F.2d 781 (5th Cir. 1969). See also, *Wall* v. *Stanly County Bd. of Educ.,* 378 F.2d 275 (4th Cir. 1967); *Rolfe* v. *Lincoln County Bd. of Educ.,* 391 F.2d 77 (6th Cir. 1968).

Assuming, but not deciding, that for decisions made in good faith the imposition of compensatory damages would be barred, the court does not find that the defendants here have established that they acted in good faith. There was testimony by the defendant Smith at trial that he had long believed the board could uphold dismissal of a probationary teacher for no cause whatsoever and had conveyed that view to members of the board. On the other hand, the evidence that the state Attorney General repeatedly cautioned the board that its actions were of quite dubious legality when coupled with the refusal of the board in the 1969 hearing to give the plaintiff any reason for his dismissal, other than his outspoken expression of his political views, suggests that the board was more interested in preserving its own notions of the propriety of faculty participation in public discussions of civil rights issues than in determining whether there were valid reasons relating to the performance of his duties as a teacher why the plaintiff should not continue to be employed.

Accordingly, the defendants Buley, Creed, Grasso, Richard Gurney, Margaret Gurney, Niejadlik, Wood and Smith, who were shown to have participated in the proceedings against the plaintiff before the personnel committee, are held jointly liable for compensatory damages. The plaintiff has offered uncontroverted testimony that he suffered a salary loss of $9000.00[4] because his contract was not renewed and judgment may be entered for the plaintiff for $9000.00 against the aforementioned defendants.

The plaintiff also seeks damages for "humiliation," pain and suffering, and injury to his reputation. Assuming arguendo that for the loss of his contract as a teacher the measure of damages might encompass items of consequential damages which are not recoverable in an action for breach of contract, his ability to secure another position teaching geography almost immediately and his subsequent election to the Connecticut House of Representatives from the district encompassing SCSC suggests that there was no injury to either his professional or general reputation. There was no medical evidence that the plaintiff had any pain and suffering nor was there any evidence that his reputation in his community was damaged. In any event, therefore, monetary damages for pain, suffering, and damaged reputation would be wholly speculative, and are denied. Cf. *Chase* v. *Fall Mountain Regional School Dist., supra,* 330 F. Supp. at 400. Although punitive or exemplary damages, including reimbursement for attorney fees in a reasonable amount, have sometimes been awarded under

[4] This sum represents the difference between what the plaintiff would have earned as a teacher at Quinnipiac (except for a leave of absence to serve in the state legislature in 1971) and what he would have earned at SCSC.

§ 1983, the court is not of the opinion that such damages are warranted. There may be times when an award of exemplary damages against state officials will be a legitimate coercive measure for securing full compliance with constitutional requirements, but that is not the case here. This case has already had that effect, for during the course of the proceedings the attorney for the defendants stated in open court that the trustees would be willing to offer the plaintiff tenure. Furthermore, the definitive ruling on a point of federal law furnished by this case for their future guidance makes unlikely any repetition of their mistake. Individual redress is the only purpose here. Cf. *Arroyo* v. *Walsh*, 317 F. Supp. 869, 873 (D. Conn. 1970).

It is urged that decisions such as the one here will have an in terrorem effect on responsible citizens deterring them from performing much-needed duties for public institutions. In the instant case the members of the board of trustees serve voluntarily. The court is keenly aware of this problem, and believes that much of the current lack of judicial agreement over the proper standard of culpability for imposing on state officials the responsibility to pay money damages stems from this very difficulty. Those who act under color of state law carry a heavier burden than those whose acts are merely private; at the same time, to leave those who suffer from a deprivation of federal rights at the hands of state officials without compensation for their losses would deny them the redress which Congress intended they should have by enacting 42 U.S.C. § 1983.

It would seem that a satisfactory solution for this problem would be for the state to bear the burden of financial

liability which is imposed on state officials who do not act in manifest bad faith in performing their duties. Where state officials, so acting, mistakenly cause losses by depriving a citizen of his civil rights, the state ought to bear the cost; otherwise, as the defendants have urged here, there is a very real danger that public service will be avoided for fear of personal liability. Courts might then award compensatory damages on a simple showing of a deprivation of civil rights, cf. *Adickes* v. *Kress & Co.*, *supra*, 398 U.S. at 232-33; at the same time they would no longer hesitate to apply the good faith defense to issues of personal liability. Cf. *Whirl* v. *Kern*, *supra*, 407 F.2d 781.

The foregoing constitutes the court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52.

IT IS ORDERED:

1. That the defendant board of trustees promptly offer to reinstate the plaintiff as a faculty member with tenure at SCSC for the 1972-73 school year with the same seniority as if his contract had been renewed in 1969; and

2. That the defendants Buley, Creed, Grasso, Richard Gurney, Margaret Gurney, Niejadlik, Wood and Smith pay the sum of $9000.00 to the plaintiff as damages.

Dated at Hartford, Connecticut, this 29th day of February, 1972.

M. JOSEPH BLUMENFELD
Chief Judge

APPENDIX G

Excerpts From Defendants' Pretrial Memorandum, Filed May 6, 1971

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 13591

IRVING STOLBERG,

Plaintiff,

vs.

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, *et al.*

Defendants

Defendants' Pretrial Memorandum

• • • • •

When the plaintiff became a member of the General Assembly of the State of Connecticut, he became ineligible for the orders he seeks. The Connecticut Constitution Article III, Section 11 provides:

> "No member of the general assembly shall during the term for which he is elected, hold or accept any appointive position in the judicial or executive department of the state government . . ."

Section 2-5 of the Connecticut General Statutes provides:

> "No member of the general assembly shall, during the term for which he is elected, be nominated, appointed

> or elected by the governor, the general assembly or any other appointing authority of this state to any position in the judicial, legislative or executive department of the state government . . ."

Thus, even if the plaintiff had been a teacher with tenure, upon becoming a member of the general assembly he would have to resign his position as a teacher. Even a "leave of absence" would not be sufficient as this would be merely "a vacation without pay". Pursuant to the aforementioned rules of the Board, any teacher, even one who has been granted tenure, who leaves the State College system loses his tenure; in the event he again is employed by the State College system he must again become a probationary teacher and go through the working test period. Therefore, even if this Court should decide the factual and substantive legal issues in favor of the plaintiff, it cannot grant the mandatory injunctive relief sought because the plaintiff has voluntarily cut himself off from his prior period of employment.

DEFENDANTS

BY ROBERT K. KILLIAN
Attorney General

SIDNEY D. GIBER
Assistant Attorney General

APPENDIX H

**Pretrial Report and Order,
Filed May 10, 1971**

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13591

IRVING STOLBERG

Plaintiff,

vs.

MEMBERS OF THE BOARD OF TRUSTEES FOR STATE COLLEGES, STATE OF CONN., *et al.*

Defendant

Pretrial Report

Pretrial Report

Date of Conference: April 22, 1971

Attorneys Present:

LOUIS M. WINER
For Plaintiff

SIDNEY D. GIBER
For Defendant

I

NATURE OF ACTION

Dismissed state college teacher seeks reinstatement and damages; teacher is presently a member of the state legislature.

II

JURISDICTION

Conceded.

III

PLEADINGS

Defendant will file amendment to answer, adding a special defense, within 7 days.

IV

DISCOVERY PROCEEDINGS

Plaintiff will complete all discovery, including depositions, within 40 days.

V

SPECIAL DAMAGES

VI

LISTS OF WITNESSES

Plaintiff will file list within 7 days.

VII

LISTS OF EXHIBITS

Plaintiff will file list within 7 days.

VIII

CLAIMS OF FACT AND LAW

Filed.

IX

REQUESTS TO CHARGE

Will be filed on first day of trial.

X

SETTLEMENT

Parties will prepare a stipulation of facts designed to shorten the trial.

XI

ASSIGNMENT FOR TRIAL

After 40 days, at first court session.

XII

STIPULATION

Counsel for all parties stipulated that this Pretrial Report may be "So ORDERED" by the Court; and counsel further stipulated that all proceedings under Rule 53, Fed. R. Civ. P., are waived.

Dated at Hartford, Connecticut, this 22nd day of April, 1971.

H. MEADE ALCORN, JR.
Special Master

RALPH C. DIXON
Special Master

So ORDERED:

R. C. ZAMPANO
U.S.D.J.

5/7/71
Date

APPENDIX I

Transcript of Proceedings at the Close of Trial, December 21, 1971

[The following took place at the end of plaintiff-petitioner's testimony and the close of his case.]

• • • • •

[166] Mr. Winer: There's no further questioning from plaintiff.

The Court: All right.

You can step down, Mr. Stolberg.

(Witness excused.)

Mr. Giber: Defense rests.

The Court: What do you gentlemen want to do now in connection with the submission of the case to the Court?

Do you want to file briefs setting forth what your claims are?

I don't know that there is very much dispute about the facts. You've furnished me with a transcript of all the testimony up to this point, except for today's, I guess; is that correct?

Mr. Giber: That's correct, your Honor.

The Court: Something was said at the outset by Mr. Winer about submitting proposed findings of fact and conclusions of law.

In view of the defendant's action in resting without introducing any other evidence, I wonder if the facts are greatly in dispute, the principal [167] facts?

Mr. Giber: I don't think we have any dispute as to the principal facts, your Honor. We've allowed anything that came from the state files to go in. We have nothing to hide in this matter.

The Court: Yes.

Mr. Giber: I think that other than the opinions stated, I think facts were presented.

Mr. Winer: If your Honor please, may I be heard for a minute?

The Court: Yes.

Mr. Winer: As I mentioned before, well, first of all, I'm startled that the defense rested at this point.

I had anticipated some explanation of exactly what the reasons for this were from the defendants. Most of the case is in these documents here.

As I mentioned, there are about six additional documents we would like to offer and I think that we would like to make the interrogatories part of the record.

But we would like to offer a motion to amend the complaint in two respects, simply to make it more specific.

I had no notion what the evidence as to reasons [168] would be when the defendants came forward, if they did, for the actions that they took and there are some more specific statements that we can make in the light of the evidence as it now stands that we—

The Court: Yes.

Well, does the defendant take the position that it is willing to offer tenure to—

Mr. Giber: Yes sir, we will give him tenure immediately.

The Court: The reason I ask is one aspect of the relief sought for is injunctive relief.

So if that is so, then the only remaining issue in the case is one of damages, isn't it?

Mr. Winer: Yes.

If your Honor please, we would like to submit an affidavit as to attorney's fees. I believe the evidence in this record and the law as it stands now will support our claim. The only way we can prove that is by affidavit.

The Court: Such an affidavit may be filed, yes.

Mr. Winer: Could we set a date for the filing of —I said this at the very outset of the case, that it's a little unusual because the testimony has to be tied in to all this documentary evidence.

[169] The Court: Well, there isn't any need to tie in so much testimony now if the defendant takes the position that it is willing to grant tenure, is that correct?

Mr. Giber: It is willing to grant tenure. He has never been denied tenure, might be one way to state it.

Mr. Winer: That's an astonishing statement.

Mr. Giber: That was one of his grounds for relief.

No, I guess we are willing to grant tenure immediately. The board will meet and he will be granted tenure.

The Court: All right.

Mr. Winer: If your Honor please, there is a question as to what period of time he can come back. The earliest he can possibly come back is next fall and that, of course, causes him great—

The Court: All right. But I mean the point is we are now talking about any damages he may have sustained.

As far as relief goes, in order to grant tenure, it has to be considered in light of the fact that there is a statement in open Court that tenure will be granted at any time. That has to do with [170] whether or not the Court should exercise the power by imposing an order to that effect.

I suppose it also has a little significance possibly as an admission that the denial or refusal or hesitancy or delay in granting tenure at an early time was not proper.

But it seems to me then the only question which remains is that of damages.

I think see no reason why the submission which you propose to offer the Court to assist the Court in the way of a finding of facts and conclusions should not be limited accordingly.

Mr. Winer: It has to do with the basis for the various claims of damages.

Could we take a brief recess, your Honor?

The Court: Well, I think we are all done. What do you want a recess for? What more do we have to do?

Mr. Winer: Well, I would like an opportunity to make a submission of these various items. They do have to do with damages.

The Court: What submission are you talking about? Something that is not yet in the record?

Mr. Winer: Yes, your Honor.

The Court: What is it?

[171] Mr. Winer: Interrogatories, six documents and an affidavit as to the attorney's fees.

The Court: Those may be presented to the Court by—

Mr. Winer: A stipulation?

The Court: By stipulation. Or if they have to do with interrogatories, or requests for admission and admissions have not been made those requests may be taken as having been admitted.

Mr. Winer: Well, may we simply have a date for the submission of briefs?

The Court: Yes. What do you want?

Mr. Winer: Would the Court prefer cross briefs or briefs in sequence?

The Court: I think a brief by the plaintiff and a response by the defendant; and you can, if you find a reply brief is necessary, file one.

How long do you want, Mr. Winer?

Mr. Winer: If we may, the middle of next week; next Wednesday.

The Court: You can have more time than that. It's up to you, of course. You may be fully prepared to knock out a brief in a hurry.

When do you want it?

Mr. Winer: Wednesday. That would be the 29th.

[172] The Court: The 29th.

You can get a brief out, in response, a week later?

Mr. Giber: I hope so, your Honor. I'll try. I believe we can.

The Court: And plaintiff's reply brief another week?

Mr. Winer: Another week, yes, your Honor.

The Court: All right.

Now, Mr. Giber made the statement that the defendant is willing to grant tenure.

Mr. Giber: Yes sir.

The Court: At any time.

Now, I don't know that at any time means forever and ever on into the future.

Mr. Giber: Excuse me, your Honor. I meant that the board is willing at this moment to meet and grant him tenure. We're figuring at, let's say, such time as the Court may direct.

The board met last week and offered tenure.

The Court: The board?

Mr. Giber: The Board of Trustees authorized me last week to offer tenure.

The Court: Very well. So you understand that.

Mr. Winer: Yes, your Honor.

[173] The Court: Okay.

Mr. Winer: If your Honor please, I believe our complaint would be more specific and a better complaint if two paragraphs were added to conform to the evidence here. And I would simply like to file with the Court a motion to amend the complaint to conform with the evidence.

I call the Court's attention and Mr. Giber's attention to the fact that the defendant hasn't filed a defense about the question of office holding while on the faculty. That was to be filed, but has never been filed.

The Court: What?

Mr. Winer: There was to have been a defense filed by the defendant having to do with the plaintiff's position in the legislature and that was never filed.

The Court: So it's not in the case. A dual job ban might affect the right to tenure?

Mr. Winer: It might affect his right to return.

Well, I withdraw the comment.

The Court: All right.

Adjourn Court.

(Whereupon, Court was adjourned.)

APPENDIX J

Stipulation Among Plaintiff-Petitioner and Defendants-Respondents Entered Into and Filed January 7, 1975

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 13591

IRVING STOLBERG,

Plaintiff,

vs.

MEMBERS OF THE BOARD OF TUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, *et al.*,

Defendants.

Stipulation Dated January 7, 1975

Plaintiff, by his attorney, and defendants and respondents cited in the Order to Show Cause herein issued December 16, 1974, by their attorney, hereby stipulate as follows:

• • • • •

1. This action was commenced by Verified Complaint filed December 15, 1969. Plaintiff sought, among other relief, reinstatement with tenure to his teaching position at Southern Connecticut State College ("Southern Connecticut"), one of Connecticut's four State Colleges, gov-

erned by the Board of Trustees for the State Colleges of Connecticut ("the Board of Trustees"). See, Sections 10-109 through 10-116a, Connecticut General Statutes.

2. Defendants herein at the time the action was commenced were the members of the Board of Trustees, in their individual and official capacities; J. Eugene Smith, the Executive Secretary of the Board of Trustees, in his individual and official capacity; and Hilton C. Buley, the President of Southern Connecticut, in his individual and official capacity.

3. During the year 1970, while this action was pending but before trial, plaintiff successfully campaigned for election to the House of Representatives of the General Assembly of the State of Connecticut. He began to serve as a member of that body on Wednesday, January 6, 1971. Plaintiff was reelected from his district in 1972 and 1974 and has served continuously as a member of the House of Representatives of the General Assembly since January of 1971.

4. Defendants' "Answer and Defenses" was filed herein on January 9, 1970. Although that pleading was initially purportedly filed on behalf of certain defendants only, it was later adopted by the remaining defendants and was the answer of all defendants at the time of trial and thereafter. Exhibit 1 is a copy of said "Answer and Defenses." Exhibit 1-A and 1-B are copies of appearances by Attorney General Killian and Assistant Attorneys General F. M. Ahern and D. B. Beizer for defendants therein specified, filed January 9, and April 20, 1970, respectively; Exhibit

1-C is a copy of the appearance of Assistant Attorney General Sidney D. Giber, for defendants, filed December 1, 1970.

5. A pretrial conference in this action was held April 22, 1971, at Hartford, before H. Meade Alcorn, Jr., and Ralph C. Dixon, Esquire, acting as Special Masters. It was attended by Louis M. Winer, Esquire, attorney for plaintiff, and by Sidney D. Giber, Esquire, Assistant Attorney General, attorney for defendants.

6. Defendants' Pretrial Memorandum was filed herein May 6, 1971, on behalf of defendants by Robert K. Killian, Attorney General, by Sidney D. Giber, Assistant Attorney General. In that memorandum, defendants stated that "When the plaintiff became a member of the General Assembly of the State of Connecticut, he became ineligible for the orders he seeks. . . ." Attorneys for defendants cited Article Third, Section 11, of the Constitution of the State of Connecticut, and a parallel provision of the Connecticut General Statutes, frequently referred to as the "dual job ban", which prohibits a member of the General Assembly from holding or accepting any appointive position or office in the "judicial or executive department of the state government". Defendants concluded in their memorandum: " . . . Therefore, even if this Court should decide the factual and substantive legal issues in favor of the plaintiff, it cannot grant the mandatory injunctive relief sought because the plaintiff has voluntarily cut himself off from his prior period of employment". Exhibit 2 is a copy of said "Defendants' Pretrial Memorandum."

7. In the Pretrial Report filed herein on May 10, 1971, which report was submitted by the above-named Special Masters and ordered in accordance with their report by Hon. Robert C. Zampano, United States District Judge, the nature of the action was described as follows:

> "Dismissed state college teacher seeks reinstatement and damages; teacher is presently a member of the state legislature."

As to the pleadings, the Report further provided as follows:

> "Defendant will file amendment to answer, adding a special defense, within 7 days."

The defense to be added had to do with defendants' claim that because of plaintiff's election to the General Assembly, he was not eligible for reinstatement. Exhibit 3 is a copy of said "Pretrial Report."

8. Defendants did not amend their "Answer and Defenses" to include any defense based on the "dual job ban" under Connecticut's Constitution and statutes.

9. No Connecticut court has determined whether, within the meaning of the provisions of the "dual job ban", a faculty member's position at any of Connecticut's state educational institutions, including Southern Connecticut, falls within "the judicial or executive department of the state government" so as to render a member of the general assembly ineligible to hold or accept such a position.

• • • • •

19. On June 26, 1973, plaintiff's attorney wrote to respondent Giber making several inquiries. Exhibit 17 is a copy of that letter. By letter dated July 10, 1973, respondent Giber replied:

> "As to your second question: What action will the Attorney General or the defendants take if Professor Stolberg maintains his seat in the legislature and accepts reinstatement at Southern Connecticut State College? The defendants have been ordered to reinstate the plaintiff with the same seniority as if the contract had been renewed in 1969. You have received Doctor Jenning's letter which states the pay grades for assistant professor. We realize that your client has had commitments to Quinnipiac College and we are willing to make every reasonable concession required to offer the courses for which it relies upon the services of Professor Stolberg. The defendants seek to comply not only with the letter of Judge Blumenfeld's order, but with the spirit of his order, as well. The defendants are holding open the doors to SCSC whether Professor Stolberg decides to return for the 1973-1974 school year or the 1974-1975 school year.
>
> "You stated in your letter that your client has questions concerning the state constitution and in reply to your request for copies of any earlier opinions on the question of whether Article 3, Section 11, of the state constitution covers faculty members of a state college, I am enclosing a copy of an opinion dated February 9, 1971. I am sure that you did not intend to ask that the Office of the Attorney General make any commit-

ments, other than on behalf of the defendants. I am confident that you will render your client your usual sound legal advice on any questions he has raised."

20. By letter dated February 6, 1974, plaintiff notified defendants' attorneys that he intended to return to Southern Connecticut for the 1974-1975 academic year. Exhibit 22 is a copy of that letter. By letter dated February 19, 1974, respondent Giber replied as indicated by Exhibit H and Exhibit 23 that he was personally pleased at plaintiff's decision to return to Southern Connecticut.

21. As indicated by and recorded in the minutes of the transactions of the Board of Trustees for June 7, 1974, under the heading of "Personnel Changes", the Board of Trustees recorded plaintiff's return and reinstatement at Southern Connecticut, with the effective date of return being August 28, 1974. Exhibit 28 is a copy of the pertinent portion of the minutes.

22. The Board of Trustees reinstated plaintiff pursuant to the Court's judgment.

23. In order to place plaintiff's name back on the payroll, a "Payroll Notice", Form COP-6, was signed and submitted for plaintiff by Paul F. Lowe, Vice President for Administrative Affairs at Southern Connecticut, indicating reemployment of plaintiff at Southern Connecticut with an effective date of August 28, 1974.

24. All payrolls submitted by Southern Connecticut for the payroll period including August 28, 1974, and for subsequent periods have carried plaintiff's name. Exhibits

30 and 31 are copies of selected pages of the payrolls for Southern Connecticut for the payroll periods ending November 7, 1974, and November 21, 1974, respectively. The original of each payroll consists of 45 pages. The pages selected are the first page of the payroll, the eighth page of the payroll (which contains plaintiff's name), and the last page of the payroll which bears the certification that: "All employees listed hereon have been regularly appointed to authorized positions and have rendered the services for which payment is to be made." Each such payroll has been signed and so certified by Paul F. Lowe, Vice President for Administrative Affairs at Southern Connecticut, who is an authorized payroll officer of the state for Southern Connecticut. Similar payrolls have been submitted for Southern Connecticut for each payroll period including and after the period including August 28, 1974, similarly signed and certified by Mr. Lowe or by another officer at Southern Connecticut authorized to sign payrolls. Payroll warrants for each such payroll have been duly prepared, issued, and registered, for the disbursement of money by the Treasurer of the State of Connecticut. Payroll checks up to and including one dated November 8, 1974, have been issued upon such payrolls and delivered to plaintiff.

25. The only persons authorized to sign payrolls for Southern Connecticut are the following members of the faculty or administration there: Manson Van B. Jennings, President; Evann Middlebrooks, Vice President for Academic Affairs; Paul F. Lowe, Vice President for Administrative Affairs; Louis I. Kuslan, Dean of Arts and Science; and Robert V. O'Brien, Associate Dean for Administrative Affairs. The signature of each, and no others,

have been submitted on a form prepared by the Office of the State Compteller [Comptroller], "Payroll Authorization Card CO-773", signed by President Jennings.

26. Although payroll checks drawn to plaintiff's order were prepared upon such payrolls, and payroll warrants for dates on and after November 22, 1974, were duly issued and registered, respondents Agostinelli, Wayne and Brooks, acting on the basis of and as a result of the opinion written and furnished by respondents Giber and Killian, dated October 28, 1974, reproduced as Exhibit G to plaintiff's Verified Application and Petition for Issuance of Order to Show Cause and for Contempt Judgment, withheld three checks payable to plaintiff although such checks were duly prepared. Exhibit 32 is a copy of these checks which the Comptroller failed to deliver to plaintiff. Exhibit 33 is a copy of the corresponding Statement of Earnings and Deductions for each such check.

27. Plaintiff continues to serve as an appointed member of the faculty at Southern Connecticut. No form has been submitted by any authorized payroll officer at Southern Connecticut to terminate plaintiff's payroll status, as is required for such termination on an appropriate Form COP-6; and no form has been submitted to cancel any payroll checks upon an appropriate Form COP-9 by any authorized payroll officer at Southern Connecticut.

• • • • •

PLAINTIFF

By /s/ LOUIS M. WINER
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—Attorney for Plaintiff—

DEFENDANTS AND RESPONDENTS

BY ROBERT K. KILLIAN,
ATTORNEY GENERAL

By /s/ BERNARD F. MCGOVERN, JR.
Bernard F. McGovern, Jr.
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30 Trinity Street
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—Attorneys for
Defendants and
Respondents—

Dated: January 7, 1975.

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

United States Code

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Connecticut Constitutional and Statutory Provisions

Constitution of the State of Connecticut, 1965

ARTICLE THIRD

OF THE LEGISLATIVE DEPARTMENT

• • • • •

§ 11. Dual office holding

Sec. 11. No member of the general assembly shall, during the term for which he is elected, hold or accept any appointive position or office in the judicial or executive department of the state government, or in the courts of the political subdivisions of the state, or in the government of any county. . . .

• • • • •

ARTICLE EIGHTH

OF EDUCATION

• • • • •

§ 2. System of higher education

Sec. 2. The state shall maintain a system of higher education, including The University of Connecticut, which shall be dedicated to excellence in higher education. The general assembly shall determine the size, number, terms and method of appointment of the governing boards of The University of Connecticut and of such constituent units or coordinating bodies in the system as from time to time may be established.

• • • • •

Connecticut General Statutes

• • • • •

§ 2-5. Holding of office by members of the general assembly

No member of the general assembly shall, during the term for which he is elected, be nominated, appointed or elected by the governor, the general assembly, or any other appointing authority of this state to any position in the judicial, legislative or executive department of the state government, except as provided in this section. The provisions of this section shall not apply where it is expressly provided by law that a member of the general assembly as such shall be nominated or appointed to any board, commission, council or other agency in the legislative department.

• • • • •

§ 3-119. Payment of salaries; statement of officers. Electronic system for personnel data

The comptroller shall pay all salaries and wages not less than ten days nor more than fifteen days after the close of the payroll period in which the services were rendered, but shall draw no order in payment for any service of which the payroll officer of the state has official knowledge without the signed statement of the latter that all employees listed on the payroll of each agency have been duly appointed to authorized positions and have rendered the services for which payment is to be made. . . .

• • • • •

§ 10-109b. Duties of state college trustees

Said board of trustees shall administer the state colleges, plan for the expansion and development of the institutions within its jurisdiction, and submit such plans to the commission for higher education for approval. The commissioner of public works shall, in accordance with section 1 of this act, negotiate and execute leases on such physical facilities as the board may deem necessary for proper operation of such institutions, subject to the approval of the commission, and said board may expend capital funds therefor if such leasing is required during the planning and construction phases of institutions within its jurisdiction for which such capital funds were authorized. The board may appoint or remove the chief executive officer of each institution within its jurisdiction, and with respect to its own operation the board of trustees may appoint and remove an executive secretary and executive staff.

The board may determine the size of the executive staff and the duties, terms and conditions of employment of said secretary and staff, subject to the approval of the commission. The board of trustees may employ faculty and other personnel needed to maintain and operate the institutions within its jurisdiction. Within the limitation of appropriations, the board shall fix the compensation of such personnel, establish terms and conditions of employment and prescribe their duties and qualifications. Said board shall determine who constitutes its professional staff and establish compensation and classification schedules for its professional staff. . . .

• • • • •

§ 10-322. Definitions

As used in sections 10-9 and 10-160 and this chapter, "the state system of higher education" or "system" means:

(1) The University of Connecticut, and all branches thereof established or authorized prior to January 1, 1965;

(2) the state colleges;

(3) state-supported regional community colleges;

(4) the state technical colleges;

(5) the central office staff of the commission for higher education; and

(6) the board for state academic awards, and "constituent units" means those units enumerated in subsections (1) to (6), inclusive, of this section.

§ 10-329a. Jurisdiction over professional staffs of higher education units

Notwithstanding the provisions of any general statute or special act to the contrary, the selection, appointment, assignment of duties, amount of compensation, sick leave, vacation, leaves of absence, termination of service, rank and status of the individual member of the respective professional staffs of the system of higher education shall be under the sole jurisdiction of the respective boards of trustees within available funds, provided said boards shall adopt for their respective institutions any general policy of the state which applies to all state employees with respect to necessary sick leave, vacation, and salary adjustments. Said boards shall determine who constitutes the professional staffs of their respective units and establish compensation and classification schedules for their professional staffs. Each constituent board shall annually submit to the personnel policy board a list of the positions which it has included within the professional staff.

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading.

• • • • •

(b) DEFENSES; FORM OF DENIALS. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an

averment, he shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

• • • • •

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

• • • • •

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

• • • • •

Rule 16. Pre-Trial Procedure; Formulating Issues. In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

• • • • •

Rule 65. Injunctions.

* * * * * –

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Supreme Court, U. S.
FILED
SEP 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-298

IRVING STOLBERG,

Petitioner

v.

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, ET AL,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

Complaint in the Civil Action of *Stolberg* v. *Niejadlik* 2a

TABLE OF AUTHORITIES

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents hereby oppose petitioner's prayer for a writ of certiorari dated August 27, 1976 and request that it be denied for the reasons set forth below.

QUESTIONS PRESENTED

1. Do the facts and law of the instant case conflict with any decisions in other circuits or with the decision of this Court?

2. Does the petition present any special or important reasons for review by this Court?

STATEMENT OF THE CASE

Respondents deem it necessary to correct certain inaccuracies and omissions in petitioner's statement of the case.

Petitioner contends that the pretrial report and order, filed May 10, 1971, directed the Attorney General to raise the dual job ban issue as a defense in the first case. Petitioner's Brief, pp. 6, 9. This claim is deceiving because based upon a discussion in the pretrial conference the Special Masters merely stated in their pretrial report that the issue could be raised by adding a special defense to the defendant's answer within seven days of the report. Petitioner's Appendix H, p. 55a.

It is significant that the defendants never formally moved to add such a defense, and were not required to do so as a matter of law as it was not necessary for the disposition of the case. As stated in the majority opinion in the Court of Appeals:

> "No such defense was ever interposed. However, at the close of the trial, the plaintiff's attorney, Louis M. Winer, called the attention of the court and the Assistant Attorney General, Sidney D. Giber, to the fact that the defendants had failed to file a defense 'about the question of office holding while on the faculty.' The following colloquy ensued:
>
> COURT: So it's not in the case. A dual job ban might effect the right to tenure?
>
> MR. WINER: It might effect his right to return. Well I withdraw the comment.
>
> COURT: All right — Adjournment.

> "Thus, the record not only reveals that the issue might have been litigated and that it was not, but that counsel for the plaintiff was perfectly well aware of it and did not press the point that it might affect his client's right to return, and that the Court, as its subsequent opinion makes clear, did not consider the issue to be in the case." Petitioner's Appendix A, p. 6a.

As further stated in the majority opinion in the Court of Appeals:

> "Appellant's argument that his natural understanding was that since reinstatement had been ordered there would be no question of his right to salary is belied by his counsel's letter to the Assistant Attorney General on June 26, 1973 which in pertinent part reads:
>
> [W]hat action will your office or the defendants take if Mr. Stolberg maintains his seat in the legislature and accepts reinstatement at Southern Connecticut? *I am sure you recognize that there are questions whether Article 3, Section 11 of the 1965 Constitution covers a teaching position at Southern Connecticut, and we wish to test this in a way that is least costly and risky for Mr. Stolberg.* However this would be no problem if the defendants and your office would take no action upon his return. Have you any precedent or earlier opinions, one way or the other, on the question whether Article 3, Section 11 covers someone teaching at a State College?
>
> "(Emphasis added). The letter is hardly consistent with the present posture of appellant that the prior judgment compelled salary payment despite the dual job ban and in fact indicates a full recognition that further litigation to test the applicability of the dual job ban to Stolberg

would be necessary. In response, the Assistant Attorney General forwarded a copy of the prior adverse opinion of the Attorney General of February 9, 1971 with a covering letter which stated:

> I am sure that you did not intend to ask that the Office of the Attorney General make any commitments, other than on behalf of the defendants. I am confident that you will render your client your usual sound legal advice on any questions he has raised.

"The record and the exchange of correspondence to which we have referred demonstrate that not only the court but also counsel for both parties believed that the Attorney General was not prevented from raising the dual job ban when and if Stolberg returned to SCSC while still a member of the General Assembly. In fact, counsel for Stolberg indicated that the issue would have to be tested. Despite that recognition, the procedural tactic here adopted sought instead to circumvent any determination of the issue on the merits by recourse to a res judicata theory. In our view, the effort was properly thwarted below." Petitioner's Appendix A, pp. 9a, 10a.

In his statement of the case, petitioner also discusses the State's "dual job ban" provisions and concludes that the claimed defenses would not be successful. However, it is clear that in light of the Attorney General's contrary opinion, the dual job ban of the Connecticut Constitution, (Article III, Section 11) and related state statute (Sec. 2-5), presents an unresolved question of state law which should be decided in the state courts, as both the District Court and Court of Appeals pointed out, and which will soon be resolved in the declaratory judgment action of *Stolberg* v. *Niejadlik*, Superior Court, New Haven County, Docket No. 144619. See Respondent's Appendix A; Petitioner's Appendix A, pp. 8a, 9a; Petitioner's Appendix C, p. 25a.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT BETWEEN THIS CASE AND ANY OTHER DECISION IN THE CIRCUITS OR IN THIS COURT.

Petitioner's first reason for granting the petition for a writ of certiorari is that the decisions below are in direct conflict with the decision in *United States* v. *Swift and Co.*, 286 U.S. 106 (1932).

An analysis of the *Swift* opinion and of the decisions below illustrates that the two cases are neither analogous nor in conflict. *United States* v. *Swift and Co.*, dealt with the power of a court of equity to modify an injunction in adaptation to changed conditions, even though the injunction was entered pursuant to a consent decree:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes in the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in

> saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The above passage from the *Swift* opinion does suggest, as petitioner asserts, that modification of a decree will not be granted lightly and is not a substitute for a direct appeal of an adverse judgment. However, in the present case respondents have not been permitted to undermine or frustrate the terms of the original judgment because the 1972 decree did not preclude the enforcement of the dual job ban by non-party state officials.

At the trial, the District Court indicated to the parties in open court that it did not regard the dual job ban issue as being in the case, and in its memorandum of decision on the motion for contempt judgment, it clarified the judgment to indicate specifically that the judgment did not prejudice the rights of appropriate state officials to assert the state constitutional dual job ban against petitioner. Petitioner's Appendix C, pp. 23a, 24a. The District Court's clarification of the 1972 judgment did not change or undermine the position of the parties bound by that judgment but rather made explicit the obvious — that no decision on the merits of a dual job ban claim had been made and that any complaints about the assertion of this ban should be raised in a separate state court proceeding.

Petitioner also claims that the decisions of the District Court and of the Court of Appeals for the Second Circuit in this case are in conflict with general principles of *res judicata* and their application to the enforcement of judgments containing equitable or injunctive provisions. The decisions below clearly recognize that one of the elements of

the doctrine of *res judicata* is that the bar of the prior judgment extends "not only to all matters pleaded, but to all that might have been. . . ." Petitioner's Appendix A, p. 5a. As stated in the majority opinion of the Court of Appeals, however:

> "In view of Judge Blumenfeld's understanding that the judgment below did not prejudice the Attorney General's present position and the court's subsequent clarification of its own judgment, it is difficult to understand how the general res judicata rubric, which precludes what 'might' have been pleaded, can now be raised when the issue was deliberately eliminated from the case, with the apparent acquiescence of plaintiff's counsel who, although recognizing that the issue might jeopardize his client's return to the faculty, nonetheless withdrew his comment and did not press the point." Petitioner's Appendix A, p. 7a.

The decisions below are thus based on an interpretation of the specific facts of the case, rather than on an erroneous application of general principles of *res judicata*.

B. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW.

It is axiomatic that this court will not grant a petition for writ of certiorari unless there are presented special and important reasons therefor. See Rule 19, Rules of the Supreme Court of the United States. The instant case presents a unique factual situation involving the state's dual job ban prohibitions (Art. III, Sec. 11, Constitution of Connecticut, and Sec. 2-5, Conn. Gen. Stat., as amended; Petitioner's Appendix K, pp. 74a, 75a), which will not likely be presented again, because as stated above, petitioner has commenced an action in the Superior Court of Connecticut seeking a declaratory

judgment and other relief as to his right to compensation under the pertinent Connecticut constitutional and statutory provisions; this state court action should once and for all resolve any doubts as to the meaning and applicability of the dual job ban provisions. See p. 4, *supra*.

Petitioner contends that the results below merit review because of certain problems they raise concerning the Federal Rules of Civil Procedure. It cannot be over-emphasized, however, that the rulings below turn upon the specific facts of the case, which facts indicate that the dual job ban issue was not in the case. In fact, the issue could have been rendered moot either by petitioner's resignation or by his failure to run for re-election or even by defeat in that attempt before he actually decided to return to Southern Connecticut State College.

CONCLUSION

For the aforegoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-298

IRVING STOLBERG,

Petitioner

v.

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, ET AL,

Respondents.

APPENDIX TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX A

COMPLAINT IN CIVIL ACTION OF *STOLBERG V. NIEJADLIK*, NO. 144619, SUPERIOR COURT, NEW HAVEN COUNTY.

1. Southern Connecticut State College ("Southern Connecticut") is one of the four State Colleges established and maintained by the State of Connecticut under the governance, maintenance, and direction, of the Board of Trustees for the State Colleges of the State of Connecticut, as a constituent unit of the System of Higher Education maintained by the State of Connecticut under Section 2 of Article Eighth of the Constitution of the State of Connecticut and under Part Seven of Chapter 164 of the Connecticut General Statutes.

2. Defendants Bernice C. Niejadlik, Peter J. Berry, Lawrence J. Davidson, Patricia A. Geen, Richard Gurney, Ernest A. Johnson, Nancy W. Kaplan, Ramon M. Martinez, Marcus M. McCraven, Margaret Shapiro, Seymour M. Smith, Jr., and Alvin B. Wood, are members of the Board of Trustees for the State Colleges of the State of Connecticut ("Board of Trustees") with such rights, powers, responsibilities, and duties, as are conferred upon them by statute.

3. Defendants Ella T. Grasso, Robert K. Killian, Henry E. Parker, J. Edward Caldwell, and Carl R. Ajello, are the officers of the Executive Department of the state government of the State of Connecticut provided for in Article Fourth of the Constitution of the State of Connecticut.

4. Defendants Joseph J. Fauliso and James J. Kennelly are President Pro Tempore of the Senate of the State of Connecticut, and Speaker of the House of Representatives of the State of Connecticut, respectively, and are the principal officers of the Legislative Department of the state

government of the State of Connecticut provided for in Article Third of the Constitution of the State of Connecticut.

5. Defendants Henry J. Becker, Jr., and Leo V. Donohue, are the Auditors of Public Accounts of the State of Connecticut.

6. Plaintiff was appointed to the faculty of Southern Connecticut State College at the rank of Assistant Professor and to hold such appointment and teach in the Geography Department at Southern Connecticut commencing at the beginning of the academic year 1966-1967.

7. Plaintiff's services were terminated by the President of Southern Connecticut State College and by the Board of Trustees for the State Colleges during the academic year 1967-1968. Upon complaint by plaintiff to the Board of Trustees, such termination was rescinded and plaintiff was reinstated to continue to serve as a faculty member during the academic year 1968-1969.

8. Plaintiff's services were again terminated and plaintiff was dismissed from his faculty position at Southern Connecticut in the spring of 1969.

9. Plaintiff claimed that such termination and dismissal violated and infringed upon plaintiff's rights under the United States Constitution, and plaintiff commenced an action in the United States District Court for the District of Connecticut in 1969. *Stolberg* v. *Buley, et als.*, Civil Action No. 13,591, United States District Court for the District of Connecticut.

10. During the academic years from 1969-1970 through 1973-1974, inclusive, plaintiff served as a member of the faculty and taught geography at Quinnipiac College in Hamden, Connecticut.

11. In 1970, plaintiff ran for and was elected to a seat in the House of Representatives of the General Assembly of the State of Connecticut, representing the 93rd Assembly District. He has been re-elected to that seat in each subsequent election from the same district and has continued to serve as a member of the House of Representatives to date.

12. In February of 1972, the United States District Court, in the action referred to in paragraph 9, above, and after trial, found that the members of the Board of Trustees for the State Colleges in 1969 had impermissibly retaliated against plaintiff for exercising his First Amendment rights under the United States Constitution by refusing to renew his teaching contract at Southern Connecticut for the academic year 1969-1970. The District Court ordered that defendants "promptly offer to reinstate the plaintiff as a faculty member with tenure."

13. Pursuant to the judgment of the District Court, plaintiff returned as of August 28, 1974, to his faculty position at Southern Connecticut, with tenure as provided for under the rules and regulations adopted and promulgated by the Board of Trustees, and plaintiff commenced to serve in that capacity to date and has committed himself under the rules and regulations of the Board of Trustees to teach summer courses during the summer of 1975 and to teach during the academic year 1975-1976.

14. Plaintiff was paid for his services from August 28, 1974, through part of November of 1974.

15. In about October of 1974, defendants Becker and Donohue made the claim that Southern Connecticut was part of the Executive Department of the state government and that plaintiff, by holding a faculty appointment at Southern Connecticut while a member of the General Assembly, was violating Section 11 of Article Third of the Constitution of

the State of Connecticut and Section 2-5 of the General Statutes.

16. Thereafter, and after various correspondence with the Governor, the Attorney General, the Comptroller, the Auditors of Public Accounts, and the Board of Trustees, the Attorney General and the Comptroller acted to cause the suspension, termination, and withholding, of salary payments to plaintiff for his services as a faculty member at Southern Connecticut although plaintiff has continued to teach there and to hold his tenured faculty position at Southern Connecticut as a member of the professional staff.

17. Defendant members of the Board of Trustees have continued to maintain plaintiff's appointment, and have submitted plaintiff's name regularly on duly certified payrolls supporting the payment of plaintiff's teaching salary.

18. Plaintiff has continued to maintain his tenured position and to fulfill his teaching duties accordingly.

19. Plaintiff has received no salary payments for his services as a faculty member at Southern Connecticut since November of 1974. Defendants Caldwell and Ajello and their predecessors have acted to cause, and to continue in effect, the suspension, termination, and withholding, of such salary payments. Defendant Caldwell continues to refuse to make salary payments to plaintiff under Section 3-119 of the General Statutes.

20. Plaintiff claims that Southern Connecticut was established as an independent state institution which does not fall within the departments of the state government established by Article Third, Article Fourth, and Article Fifth, of

the Constitution of the State of Connecticut, for purposes of the above "dual-job ban", and further contends that the State Colleges and their predecessor institutions have long been recognized as independent state institutions existing outside of the political departments of the state and were so maintained and continued by their incorporation into the State System of Higher Education by Public Act No. 33, 1965, and by the provision for and incorporation of such State System of Higher Education, including the State Colleges in the Constitution, not under Articles Third, Fourth, or Fifth, but rather under Section 2 of Article Eighth of the Constitution as adopted in 1965, and under which the Board of Trustees is to maintain independent powers and autonomy and to be free to decide in governing, directing, and maintaining, the State Colleges.

21. Plaintiff further claims that, if Southern Connecticut falls within the Executive Department, the Judicial Department, or the Legislative Department, of the state government of the State of Connecticut, then the provisions of Section 11 of Article Third of the Constitution and Section 2-5, in the circumstances, and upon plaintiff's return to the faculty of Southern Connecticut and continuance therein and after August of 1974, do not and did not affect his status as a faculty member at Southern Connecticut.

22. Plaintiff further claims that, if he is incorrect in either of the claims asserted in paragraphs 21 and 22, above, then the provisions of Section 11 of Article Third of the Constitution and Section 2-5 of the General Statutes, as so interpreted and in the circumstances as applied to him, are overbroad and unduly vague in violation of the Due Process Clause and the Equal Protection Clause of the United States

Constitution and in violation of the related provisions of the Constitution of the State of Connecticut.

23. There are, between and among the parties, actual bona fide and substantial questions and issues in dispute and a substantial uncertainty of legal relations requiring settlement.

The plaintiff claims a declaratory judgment determining:

1. Whether Southern Connecticut State College, and plaintiff's position as a member of the faculty there, falls within the legislative department, the executive department, or the judicial department of the state government, within the meaning of Section 11 of Article Third of the Constitution of the State of Connecticut and Section 2-5 of the General Statutes.

2. Whether, if said State College and said faculty position fall within one of said departments for such purposes, plaintiff continued to hold and continues to hold his appointment as a faculty member with tenured status at Southern Connecticut State College to which he was reinstated as of August 28, 1974.

3. Whether Section 11 of Article Third of the Constitution of the State of Connecticut and Section 2-5 of the General Statutes, as applied to plaintiff in the circumstances, are overbroad and unduly vague in violation of the Due Process Clause and the Equal Protection Clause of the United States Constitution and the related provisions of the Constitution of the State of Connecticut.

Morris Tyler, of Woodbridge, Connecticut, is recognized in the sufficient sum of Two Hundred and Fifty Dollars ($250.00) to prosecute, etc.

Of this writ, with your doings thereon, make due service and return.

Dated at New Haven, Connecticut, this eighteenth day of July, 1975.

/s/ LOUIS M. WINER
Louis M. Winer
Juris No. 68162
Commissioner of the Superior Court

Please enter the appearance of:

TYLER, COOPER, GRANT, BOWERMAN & KEEFE
Juris No. 64830

By /s/ LOUIS M. WINER
Louis M. Winer
P. O. Box 1936
205 Church Street
New Haven, Connecticut 06509
Tel.: (203) 777-6231

For the plaintiff.